COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À LA SENTENCE ARBITRALE DU 31 JUILLET 1989

(GUINÉE-BISSAU c. SÉNÉGAL)

ARRÊT DU 12 NOVEMBRE 1991

1991

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JUDGMENT

COUR INTERNATIONALE DE JUSTICE

1991
2 novembre
Rôle général
n° 82

ANNÉE 1991

12 novembre 1991

AFFAIRE RELATIVE À LA SENTENCE ARBITRALE DU 31 JUILLET 1989

(GUINÉE-BISSAU c. SÉNÉGAL)

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Nullité alléguée de la sentence pour excès de pouvoir et défaut de motivation — Réponse devant être apportée à la seconde question posée au Tribunal par le compromis d'arbitrage «en cas de réponse négative» à la première question — Absence de réponse à la seconde question — Question de savoir si l'absence de réponse repose sur une motivation suffisante — Critique de la structure de la sentence.

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INTERNATIONAL COURT OF JUSTICE

YEAR 1991

12 November 1991

1991
12 November
General List
No. 82

CASE CONCERNING THE ARBITRAL AWARD OF 31 JULY 1989

(GUINEA-BISSAU *v.* SENEGAL)

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ARRÊT

Présents : Sir Robert JENNINGS, *Président* ; M. ODA, *Vice-Président* ; MM. LACHS, AGO, SCHWEBEL, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN, AGUILAR MAWDSLEY, WEERAMANTRY, RANJEVA, *juges* ; MM. THIERRY, MBAYE, *juges* ad hoc ; M. VALENCIA-OSPINA, *Greffier.*

En l'affaire relative à la sentence arbitrale du 31 juillet 1989,

entre

la République de Guinée-Bissau,

représentée par

S. Exc. M. Fidélis Cabral de Almada, ministre d'Etat à la Présidence du Conseil d'Etat de la Guinée-Bissau,

comme agent ;

S. Exc. M. Fali Embalo, ambassadeur de Guinée-Bissau auprès des pays du Benelux et des Communautés européennes,

comme coagent ;

M^me^ Monique Chemillier-Gendreau, professeur à l'Université de Paris VII,
M. Miguel Galvão Teles, avocat et ancien membre du Conseil d'Etat du Portugal,
M. Keith Highet, professeur adjoint de droit international à la Fletcher School of Law and Diplomacy et membre des barreaux de New York et du district de Columbia,
M. Charalambos Apostolidis, maître de conférences à l'Université de Bourgogne,
M. Paulo Canelas de Castro, assistant à la faculté de droit de l'Université de Coïmbre,
M. Michael B. Froman, Harvard Law School,

comme conseils ;

M. Mario Lopes, procureur général de la République,
M. Feliciano Gomes, chef d'état-major de la marine nationale,

comme conseillers,

et

la République du Sénégal,

représentée par

S. Exc. M. Doudou Thiam, avocat à la Cour, ancien bâtonnier, membre de la Commission du droit international,

comme agent ;

Provision in Arbitration Agreement for drawing of boundary line on a map — Decision not to attach map sufficiently reasoned — Absence of map not, in the circumstances of the case, such an irregularity as would render award invalid.

JUDGMENT

Present: *President* Sir Robert JENNINGS; *Vice-President* ODA; *Judges* LACHS, AGO, SCHWEBEL, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN, AGUILAR MAWDSLEY, WEERAMANTRY, RANJEVA; *Judges* ad hoc THIERRY, MBAYE; *Registrar* VALENCIA-OSPINA.

In the case concerning the Arbitral Award of 31 July 1989,

between

the Republic of Guinea-Bissau,

represented by

H.E. Mr. Fidélis Cabral de Almada, Minister of State attached to the Presidency of the Council of State of Guinea-Bissau,

as Agent;

H.E. Mr. Fali Embalo, Ambassador of Guinea-Bissau to the Benelux countries and the European Communities,

as Co-Agent;

Mrs. Monique Chemillier-Gendreau, Professor at the University of Paris VII,
Mr. Miguel Galvão Teles, Advocate and former Member of the Council of State of Portugal,
Mr. Keith Highet, Adjunct Professor of International Law at the Fletcher School of Law and Diplomacy and Member of the Bars of New York and the District of Columbia,
Mr. Charalambos Apostolidis, Lecturer at the University of Bourgogne,

Mr. Paulo Canelas de Castro, Assistant Lecturer at the Law Faculty of the University of Coimbra,
Mr. Michael B. Froman, Harvard Law School,

as Counsel;

Mr. Mario Lopes, Procurator-General of the Republic,
Mr. Feliciano Gomes, Chief of Staff of the National Navy,

as Advisers,

and

the Republic of Senegal,

represented by

H.E. Mr. Doudou Thiam, Advocate, former Bâtonnier, Member of the International Law Commission,

as Agent;

M. Birame Ndiaye, professeur de droit,
M. Tafsir Malick Ndiaye, professeur de droit,

comme coagents;

M. Derek W. Bowett, Q.C., Queens' College, Cambridge; professeur de droit international, titulaire de la chaire Whewell, Université de Cambridge,
M. Francesco Capotorti, professeur de droit international à l'Université de Rome,
M. Ibou Diaite, professeur de droit,
M. Amadou Diop, conseiller juridique à l'ambassade du Sénégal auprès des pays du Benelux,
M. Richard Meese, conseil juridique, associé du cabinet Frere Cholmeley, à Paris,

comme conseils,

LA COUR,

ainsi composée,

après délibéré en chambre du conseil,

rend l'arrêt suivant:

1. Le 23 août 1989, l'ambassadeur de la République de Guinée-Bissau aux Pays-Bas a déposé au Greffe de la Cour une requête introduisant une instance contre la République du Sénégal au sujet d'un différend concernant l'existence et la validité de la sentence arbitrale rendue le 31 juillet 1989 par un tribunal arbitral constitué en vertu d'un compromis d'arbitrage conclu entre les deux Etats le 12 mars 1985. La requête invoque, pour fonder la compétence de la Cour, les déclarations par lesquelles les deux Parties ont accepté la juridiction de la Cour ainsi qu'il est prévu au paragraphe 2 de l'article 36 du Statut de la Cour.

2. En application du paragraphe 2 de l'article 40 du Statut, la requête a été immédiatement communiquée par le Greffier à la République du Sénégal; conformément au paragraphe 3 du même article, tous les autres Etats admis à ester devant la Cour ont été informés de cette requête.

3. Par ordonnance du 1er novembre 1989, la Cour a fixé les délais pour le dépôt des pièces de la procédure écrite (mémoire de la Guinée-Bissau et contre-mémoire du Sénégal).

4. La Cour comptant à l'époque sur le siège un juge de nationalité sénégalaise, M. Kéba Mbaye, Vice-Président de la Cour, mais ne comptant aucun juge de la nationalité de la Guinée-Bissau, le Gouvernement de la Guinée-Bissau, dans l'exercice du droit que lui confère le paragraphe 2 de l'article 31 du Statut de la Cour, a désigné M. Hubert Thierry pour siéger en qualité de juge *ad hoc* en l'espèce.

5. Le 18 janvier 1990, le Gouvernement de la Guinée-Bissau a déposé au Greffe de la Cour une demande en indication de mesures conservatoires, en vertu de l'article 41 du Statut de la Cour et de l'article 74 de son Règlement. Par ordonnance du 2 mars 1990, la Cour, après avoir entendu les Parties, a rejeté cette demande.

6. Le mémoire et le contre-mémoire ayant été dûment déposés dans les délais fixés par la Cour, l'affaire s'est trouvée en état conformément au paragraphe 1 de l'article 54 du Règlement.

Mr. Birame Ndiaye, Professor of Law,
Mr. Tafsir Malick Ndiaye, Professor of Law,

as Co-Agents;

Mr. Derek W. Bowett, Q.C., Queens' College, Cambridge; Whewell Professor of International Law, University of Cambridge,
Mr. Francesco Capotorti, Professor of International Law, University of Rome,
Mr. Ibou Diaite, Professor of Law,
Mr. Amadou Diop, Legal Adviser, Embassy of Senegal to the Benelux countries,
Mr. Richard Meese, Legal Adviser, partner in Frere Cholmeley, Paris,

as Counsel,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 23 August 1989 the Ambassador of the Republic of Guinea-Bissau to the Netherlands filed in the Registry of the Court an Application instituting proceedings against the Republic of Senegal in respect of a dispute concerning the existence and validity of the Arbitral Award delivered on 31 July 1989 by an arbitration tribunal established pursuant to an Arbitration Agreement between the two States dated 12 March 1985. In order to found the jurisdiction of the Court the Application relied on the declarations made by the two Parties accepting the jurisdiction of the Court as provided for in Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was communicated forthwith by the Registrar to the Republic of Senegal; in accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. By an Order dated 1 November 1989 the Court fixed time-limits for the written proceedings (Memorial of Guinea-Bissau and Counter-Memorial of Senegal).

4. Since the Court at that time included upon the Bench a judge of Senegalese nationality, Judge Kéba Mbaye, Vice-President of the Court, but did not include a judge of the nationality of Guinea-Bissau, the Government of Guinea-Bissau, in exercise of its right under Article 31, paragraph 2, of the Statute of the Court, chose Mr. Hubert Thierry to sit as judge *ad hoc* in the case.

5. On 18 January 1990 the Government of Guinea-Bissau filed in the Registry of the Court a request, on the basis of Article 41 of the Statute of the Court and Article 74 of the Rules of Court, for the indication of provisional measures. By an Order dated 2 March 1990, the Court, after hearing the Parties, dismissed that request.

6. The Memorial and Counter-Memorial having been duly filed within the time-limits fixed by the Court, the case became ready for hearing in accordance with Article 54, paragraph 1, of the Rules of Court.

7. Le 5 février 1991, le mandat de M. Mbaye a pris fin conformément au Statut. Le Gouvernement du Sénégal était désormais en droit, en vertu du paragraphe 3 de l'article 31 du Statut de la Cour, de désigner une personne de son choix pour siéger en l'espèce en qualité de juge *ad hoc*, et a désigné M. Mbaye.

8. Au cours d'audiences publiques tenues du 3 au 11 avril 1991, la Cour a entendu les exposés oraux qu'ont prononcés devant elle:

Pour la République de Guinée-Bissau:	S. Exc. M. Fidélis Cabral de Almada, M^{me} Monique Chemillier-Gendreau, M. Miguel Galvão Teles, M. Keith Highet.
Pour la République du Sénégal:	S. Exc. M. Doudou Thiam, M. Derek W. Bowett, Q.C., M. Francesco Capotorti.

Au cours des audiences, des questions ont été posées aux deux Parties par des membres de la Cour; des réponses écrites ont été déposées au Greffe, conformément au paragraphe 4 de l'article 61 du Règlement.

9. Durant les audiences, l'agent de la Guinée-Bissau a demandé à la Cour d'autoriser la citation, en qualité de témoin ou de témoin-expert, d'une personne dont le nom figurait déjà, en qualité de conseiller, sur la liste des représentants de cet Etat fournie par lui à la Cour; l'agent du Sénégal, se fondant notamment sur l'article 57 du Règlement, y a fait objection. Après examen, la Cour a décidé qu'il n'y avait pas lieu d'accéder à la demande de la Guinée-Bissau.

* *

10. Au cours de la procédure écrite, les conclusions ci-après ont été présentées par les Parties:

Au nom de la République de Guinée-Bissau,

dans le mémoire:

> «Le Gouvernement de la Guinée-Bissau par les motifs ci-dessus exposés, et par tous les autres les complétant ou amendant qu'elle se réserve de produire et développer durant la suite de la procédure écrite et orale, prie respectueusement la Cour de dire et juger:
>
> — que la prétendue «sentence» du 31 juillet 1989 est frappée d'inexistence par le fait que, des deux arbitres ayant constitué en apparence une majorité en faveur du texte de la «sentence», l'un a, par une déclaration annexe, exprimé une opinion en contradiction avec celle apparemment votée;
>
> — subsidiairement, que cette prétendue décision est frappée de nullité absolue, le Tribunal ayant négligé de répondre à la seconde question posée par le compromis d'arbitrage, alors que sa réponse à la première question ouvrait la nécessité d'une réponse à la seconde, ne s'étant pas conformé aux dispositions du compromis arbitral par lesquelles il était demandé au Tribunal de décider sur la délimitation de l'ensemble des espaces maritimes, de le faire par une ligne unique et d'en porter le tracé sur une carte et n'ayant pas motivé les restrictions ainsi abusivement apportées à sa compétence;

7. On 5 February 1991 the term of office of Judge Mbaye came to an end in accordance with the Statute. The Government of Senegal thereupon became entitled, under Article 31, paragraph 3, of the Statute of the Court, to choose a judge *ad hoc* to sit in the case, and chose Judge Mbaye.

8. At public hearings held between 3 and 11 April 1991, the Court heard oral arguments addressed to it by the following:

For the Republic of Guinea-Bissau:	H.E. Mr. Fidélis Cabral de Almada, Mrs. Monique Chemillier-Gendreau, Mr. Miguel Galvão Teles, Mr. Keith Highet.
For the Republic of Senegal:	H.E. Mr. Doudou Thiam, Mr. Derek W. Bowett, Q.C., Mr. Francesco Capotorti.

In the course of the hearings, questions were put to both Parties by Members of the Court; replies in writing were filed in the Registry in accordance with Article 61, paragraph 4, of the Rules of Court.

9. During the hearings, the Agent of Guinea-Bissau requested the Court to authorize the calling as a witness or expert witness of a person already included, as an adviser, in the list of those representing that State furnished by it to the Court; the Agent of Senegal, on the basis, *inter alia*, of Article 57 of the Rules of Court, objected to this being done. After consideration, the Court decided that it would not be appropriate to accede to the request of Guinea-Bissau.

* *

10. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Republic of Guinea-Bissau,

in the Memorial:

> "For the reasons set forth above, and for any other reasons adding to or amending them which it reserves the right to submit and elaborate on during the subsequent written and oral proceedings, the Government of Guinea-Bissau respectfully asks the Court to adjudge and declare:
>
> — that the so-called 'award' of 31 July 1989 is inexistent in view of the fact that one of the two arbitrators making up the appearance of a majority in favour of the text of the 'award', has, by a declaration appended to it, expressed a view in contradiction with the one apparently adopted by the vote;
>
> — subsidiarily, that that so-called decision is absolutely null and void, as the Tribunal failed to reply to the second question raised by the Arbitration Agreement, whereas its reply to the first question implied a need for a reply to be given to the second, as it did not comply with the provisions of the Arbitration Agreement by which the Tribunal was asked to decide on the delimitation of the maritime areas as a whole, to do so by a single line and to record that line on a map, and as it has not given the reasons for the restrictions thus improperly placed upon its jurisdiction;

— que c'est donc à tort que le Gouvernement du Sénégal prétend imposer à celui de la Guinée-Bissau l'application de la prétendue sentence du 31 juillet 1989. »

Au nom de la République du Sénégal,

dans le contre-mémoire :

> « Au vu des *faits et arguments* exposés ci-dessus, le Gouvernement de la République du Sénégal prie la Cour de :
>
> 1. Rejeter les conclusions du Gouvernement de la République de Guinée-Bissau tendant à faire établir l'inexistence et, subsidiairement, la nullité de la sentence arbitrale du 31 juillet 1989;
>
> 2. Dire et juger que cette sentence arbitrale est valable et obligatoire pour la République du Sénégal et la République de Guinée-Bissau, qui sont tenues de l'appliquer. »

11. Au terme de son dernier exposé oral, chacune des Parties a présenté des conclusions identiques à celles qui figuraient respectivement dans le mémoire et le contre-mémoire.

* * *

12. Les événements qui ont conduit à la présente instance sont les suivants : le 26 avril 1960, un accord a été conclu, par échange de lettres, entre la France, en son nom propre et au nom de la communauté, et le Portugal, en vue de définir la frontière maritime entre la République du Sénégal (qui à cette époque était un Etat autonome de la communauté) et la province portugaise de Guinée. Dans sa lettre, la France proposait notamment ce qui suit :

> « Jusqu'à la limite extérieure des mers territoriales, la frontière serait définie par une ligne droite, orientée à 240 degrés, partant du point d'intersection du prolongement de la frontière terrestre et de la laisse de basse mer, représenté à cet effet par le phare du cap Roxo.
>
> En ce qui concerne les zones contiguës et le plateau continental, la délimitation serait constituée par le prolongement rectiligne, dans la même direction, de la frontière des mers territoriales. »

La lettre du Portugal marquait l'accord de ce dernier sur cette proposition.

13. Après l'accession du Sénégal et de la Guinée-Bissau à l'indépendance, un différend s'est élevé entre les deux Etats au sujet de la délimitation de leurs espaces maritimes. A partir de 1977, ce différend a fait l'objet entre eux de négociations au cours desquelles le Sénégal a soutenu notamment que la ligne définie dans l'accord de 1960 avait été valablement acquise, alors que la Guinée-Bissau a contesté la validité de l'accord et l'opposabilité de celui-ci à la Guinée-Bissau et a insisté pour que les espaces maritimes en cause soient délimités en faisant abstraction de cet accord.

14. Le 12 mars 1985, les Parties ont conclu un compromis d'arbitrage en vue de soumettre le différend à un tribunal arbitral. Les dispositions du compromis présentant de l'intérêt pour les questions dont la Cour est saisie se lisent comme suit :

> « Le Gouvernement de la République du Sénégal et le Gouvernement de la République de Guinée-Bissau,

> — that the Government of Senegal is thus not justified in seeking to require the Government of Guinea-Bissau to apply the so-called award of 31 July 1989."

On behalf of the Republic of Senegal,

in the Counter-Memorial:

> "Considering the *facts and arguments* stated above, the Government of the Republic of Senegal requests the Court to:
>
> 1. Reject the Submissions of the Government of the Republic of Guinea-Bissau directed at establishing the inexistence and, subsidiarily, the nullity of the Arbitral Award of 31 July 1989.
> 2. Adjudge and declare that the said Arbitral Award is valid and binding for the Republic of Senegal and the Republic of Guinea-Bissau, which have the obligation to apply it."

11. At the conclusion of its last oral statement, each Party presented submissions identical to those contained respectively in the Memorial and the Counter-Memorial.

* * *

12. The events leading up to the present proceedings are as follows. On 26 April 1960 an Agreement by exchange of letters was concluded between France, on its own behalf and that of the *Communauté*, and Portugal for the purpose of defining the maritime boundary between the Republic of Senegal (at that time an autonomous State within the *Communauté*) and the Portuguese Province of Guinea. The letter of France proposed *(inter alia)* as follows:

> "As far as the outer limit of the territorial sea, the boundary shall consist of a straight line drawn at 240° from the intersection of the prolongation of the land frontier and the low-water mark, represented for that purpose by the Cape Roxo lighthouse.
>
> As regards the contiguous zones and the continental shelf, the delimitation shall be constituted by the prolongation in a straight line, in the same direction, of the boundary of the territorial seas."

The letter of Portugal expressed its agreement to this proposal.

13. After the accession to independence of Senegal and Guinea-Bissau a dispute arose between them concerning the delimitation of their maritime areas. This dispute was the subject of negotiations between them from 1977 onward, in the course of which Senegal asserted, *inter alia*, that the line defined in the 1960 Agreement had been validly established, while Guinea-Bissau disputed the validity of that Agreement and its opposability to Guinea-Bissau, and insisted that the maritime areas in question be delimited without reference to the Agreement.

14. On 12 March 1985 the Parties concluded an Arbitration Agreement for submission of that dispute to an arbitration tribunal; the terms of the Agreement, so far as relevant to the questions now before the Court, were as follows:

> "The Government of the Republic of Senegal and the Government of the Republic of Guinea-Bissau,

Reconnaissant qu'ils n'ont pu résoudre par voie de négociation diplomatique le différend relatif à la détermination de leur frontière maritime,

Désirant, étant donné leurs relations amicales, parvenir au règlement de ce différend dans les meilleurs délais, et à cet effet ayant décidé de recourir à un arbitrage,

Sont convenus de ce qui suit :

Article premier

1. Le Tribunal arbitral (ci-dessous appelé le Tribunal) sera composé de trois membres désignés de la manière suivante :

Chaque Partie nommera un arbitre de son choix ;
Le troisième arbitre qui fera fonction de président du Tribunal sera nommé d'un commun accord, par les deux Parties ; ou à défaut, ce choix sera effectué d'un commun accord, par les deux arbitres, après consultation des deux Parties.
2. ...
3. ...

Article 2

Il est demandé au Tribunal de statuer conformément aux normes du droit international sur les questions suivantes :

1. L'accord conclu par un échange de lettres, le 26 avril 1960, et relatif à la frontière en mer, fait-il droit dans les relations entre la République de Guinée-Bissau et la République du Sénégal ?

2. En cas de réponse négative à la première question, quel est le tracé de la ligne délimitant les territoires maritimes qui relèvent respectivement de la République de Guinée-Bissau et de la République du Sénégal ?

. . . .

Article 4

1. Le Tribunal ne pourra statuer que s'il est au complet.
2. Les décisions du Tribunal relatives à toutes questions de fond ou de procédure, y compris toutes les questions concernant la compétence du Tribunal et l'interprétation du compromis, seront prises à la majorité de ses membres.

. . . .

Article 9

1. Quand les procédures devant le Tribunal auront pris fin, celui-ci fera connaître aux deux gouvernements sa décision quant aux questions énoncées à l'article 2 du présent compromis.
2. Cette décision doit comprendre le tracé de la ligne frontière sur une carte. A cette fin, le Tribunal sera habilité à désigner un ou des experts techniques pour l'assister dans la préparation de cette carte.
3. La décision sera pleinement motivée.
4. ...

Recognizing that they have been unable to settle by means of diplomatic negotiation the dispute relating to the determination of their maritime boundary,

Desirous, in view of their friendly relations, to reach a settlement of that dispute as soon as possible and, to that end, having decided to resort to arbitration,

Have agreed as follows:

Article 1

1. The Arbitration Tribunal (hereinafter called "the Tribunal") shall consist of three members designated in the following manner:

Each Party shall appoint one arbitrator of its choice;

The third arbitrator, who shall function as President of the Tribunal, shall be appointed by mutual agreement of the two Parties or, in the absence of such agreement, by agreement of the two arbitrators after consultation with the two Parties.

2. ...
3. ...

Article 2

The Tribunal is requested to decide in accordance with the norms of international law on the following questions:

1. Does the Agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?
2. In the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively?

. . . .

Article 4

1. The Tribunal shall take its decisions only in its full composition.
2. The decisions of the Tribunal relating to all questions of substance or procedure, including all questions relating to the jurisdiction of the Tribunal and the interpretation of the Agreement, shall be taken by a majority of its members.

. . . .

Article 9

1. Upon completion of the proceedings before it, the Tribunal shall inform the two Governments of its decision regarding the questions set forth in Article 2 of the present Agreement.
2. That decision shall include the drawing of the boundary line on a map. To that end, the Tribunal shall be empowered to appoint one or more technical experts to assist it in the preparation of such map.
3. The Award shall state in full the reasons on which it is based.
4. ...

Article 10

1. La sentence arbitrale sera revêtue de la signature du président du Tribunal et du greffier. Celui-ci remettra une copie conforme établie dans les deux langues aux agents des deux Parties.

2. La sentence sera définitive et obligatoire pour les deux Etats qui seront tenus de prendre toutes les mesures que comporte son exécution.

3. ...

Article 11

1. Aucune activité des Parties pendant la durée de la procédure ne pourra être considérée comme préjugeant de leur souveraineté dans la zone objet du compromis d'arbitrage.

2. ...

. . . .

Fait en double exemplaire à Dakar, le 12 mars 1985, en langues française et portugaise, les deux textes faisant également foi. »

15. Un tribunal arbitral a été dûment constitué en vertu du compromis, M. Mohammed Bedjaoui et M. André Gros ayant successivement été désignés comme arbitres et M. Julio A. Barberis comme président. Le 31 juillet 1989 le Tribunal a rendu la sentence dont l'existence et la validité ont été contestées dans la présente instance. Selon ses propres termes, cette sentence a été adoptée par deux voix, celle du président du Tribunal et celle de M. Gros, contre une, celle de M. Bedjaoui.

16. Aux fins du présent arrêt, les conclusions du Tribunal peuvent se résumer comme suit : le Tribunal a estimé que l'accord de 1960 était valable et opposable au Sénégal et à la Guinée-Bissau (sentence, par. 80); que l'accord devait être interprété à la lumière du droit en vigueur à la date de sa conclusion (*ibid.*, par. 85); que

> « l'accord de 1960 ne délimite pas les espaces maritimes qui n'existaient pas à cette date, qu'on les appelle zone économique exclusive, zone de pêche ou autrement... » ;

mais que

> « la mer territoriale, la zone contiguë et le plateau continental ... sont expressément mentionnés dans l'accord de 1960 et elles existaient à l'époque de sa conclusion » *(ibid.)*.

Le Tribunal a poursuivi :

> « En ce qui concerne le plateau continental, la question de savoir jusqu'à quel point la ligne frontière se prolonge peut se poser aujourd'hui, étant donné l'évolution accomplie par la définition du concept de « plateau continental ». En 1960 deux critères servaient à déterminer l'étendue du plateau continental : celui de la ligne bathymétrique de 200 mètres et celui de l'exploitabilité. Ce dernier impliquait une conception dynamique du plateau continental, puisque sa limite extérieure était fonction du développement de la technologie et, par conséquent, susceptible de se déplacer de plus en plus vers le large. En vertu du fait que le « plateau continental » existait dans le droit international en vigueur en 1960 et que la définition du concept d'un tel espace maritime comportait alors le critère dynamique

Article 10

1. The Arbitral Award shall be signed by the President of the Tribunal and by the Registrar. The latter shall hand to the Agents of the two Parties a certified copy in the two languages.

2. The Award shall be final and binding upon the two States which shall be under a duty to take all necessary steps for its implementation.

3. . . .

Article 11

1. No activity of the Parties during the course of the proceedings may be deemed to prejudge their sovereignty over the areas the subject of the Arbitration Agreement.

2. . . .

. . . .

Done in duplicate in Dakar, on 12 March 1985, in the French and Portuguese languages, both texts being equally authentic."

15. An Arbitration Tribunal was duly constituted under the Agreement, by the appointment first of Mr. Mohammed Bedjaoui and then of Mr. André Gros, Arbitrators, and of Mr. Julio A. Barberis, President. On 31 July 1989 the Tribunal pronounced the Award the existence and validity of which have been challenged in the present proceedings. According to this Award it was adopted by the votes of the President of the Tribunal and Mr. Gros, over the negative vote of Mr. Bedjaoui.

16. The findings of the Tribunal may for the purposes of the present judgment be summarized as follows. The Tribunal concluded that the 1960 Agreement was valid and could be opposed to Senegal and to Guinea-Bissau (Award, para. 80); that it had to be interpreted in the light of the law in force at the date of its conclusion (*ibid.*, para. 85); that

> "the 1960 Agreement does not delimit those maritime spaces which did not exist at that date, whether they be termed exclusive economic zone, fishery zone or whatever . . .",

but that

> "the territorial sea, the contiguous zone and the continental shelf . . . are expressly mentioned in the 1960 Agreement and they existed at the time of its conclusion" *(ibid.)*.

The Tribunal went on to say that:

> "As regards the continental shelf, the question of determining how far the boundary line extends can arise today, in view of the evolution of the definition of the concept of 'continental shelf'. In 1960, two criteria served to determine the extent of the continental shelf: that of the 200-metre bathymetric line and that of exploitability. The latter criterion involved a dynamic conception of the continental shelf, since the outer limit would depend on technological developments and could consequently move further and further to seaward. In view of the fact that the 'continental shelf' existed in the international law in force in 1960, and that the definition of the concept of that maritime space then included the dynamic criterion indicated, it may be concluded that the Franco-Portuguese Agreement

indiqué, on peut conclure que l'accord franco-portugais délimite le plateau continental entre les Parties dans toute l'étendue de la définition actuelle de cet espace maritime. » (Sentence, par. 85.)

17. Le Tribunal a ensuite expliqué:

« En tenant compte des conclusions ci-dessus auxquelles le Tribunal est parvenu et du libellé de l'article 2 du compromis arbitral, la deuxième question, de l'avis du Tribunal, n'appelle pas une réponse de sa part.

Au surplus, le Tribunal n'a pas jugé utile, étant donné sa décision, de joindre une carte comprenant le tracé de la ligne frontière. » (*Ibid.*, par. 87.)

18. Le dispositif de la sentence était ainsi libellé:

« Vu les motifs qui ont été exposés, le Tribunal *décide* par deux voix contre une:

De répondre à la première question formulée dans l'article 2 du compromis arbitral de la façon suivante: l'accord conclu par un échange de lettres, le 26 avril 1960, et relatif à la frontière en mer, fait droit dans les relations entre la République de Guinée-Bissau et la République du Sénégal en ce qui concerne les seules zones mentionnées dans cet accord, à savoir la mer territoriale, la zone contiguë et le plateau continental. La « ligne droite orientée à 240° » est une ligne loxodromique. » (Par. 88.)

19. M. Barberis, président du Tribunal, a joint une déclaration à la sentence, et M. Bedjaoui, qui a voté contre cette sentence, y a joint une opinion dissidente. La déclaration de M. Barberis était ainsi conçue:

« J'estime que la réponse donnée par le Tribunal à la première question posée par le compromis arbitral aurait pu être plus précise. En effet, j'aurais répondu à cette question de la façon suivante:

« L'accord conclu par un échange de lettres, le 26 avril 1960, et relatif à la frontière en mer, fait droit dans les relations entre la République de Guinée-Bissau et la République du Sénégal en ce qui concerne la mer territoriale, la zone contiguë et le plateau continental, mais il ne fait pas droit quant aux eaux de la zone économique exclusive ou à la zone de pêche. La « ligne droite orientée à 240° » visée dans l'accord du 26 avril 1960 est une ligne loxodromique. »

Cette réponse partiellement affirmative et partiellement négative est, à mon avis, la description exacte de la situation juridique existant entre les Parties. Comme la Guinée-Bissau l'a suggéré au cours de cet arbitrage (réplique, p. 248), cette réponse aurait habilité le Tribunal à traiter dans la sentence la deuxième question posée par le compromis arbitral. La réponse *partiellement* négative à la première question aurait attribué au Tribunal une compétence *partielle* pour répondre à la deuxième, c'est-à-dire pour le faire dans la mesure où la réponse à la première question eût été négative.

Dans ce cas, le Tribunal aurait été compétent pour délimiter les eaux de

delimits the continental shelf between the Parties over the whole extent of that maritime space as defined at present." (Award, para. 85.)

17. The Tribunal then explained that

> "Bearing in mind the above conclusions reached by the Tribunal and the wording of Article 2 of the Arbitration Agreement, in the opinion of the Tribunal it is not called upon to reply to the second question.
>
> Furthermore, in view of its decision, the Tribunal considered that there was no need to append a map showing the course of the boundary line." (*Ibid.*, para. 87.)

18. The operative clause of the Award was as follows:

> "For the reasons stated above, the Tribunal *decides* by two votes to one:
>
> To reply as follows to the first question formulated in Article 2 of the Arbitration Agreement: The Agreement concluded by an exchange of letters of 26 April 1960, and relating to the maritime boundary, has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal with regard solely to the areas mentioned in that Agreement, namely the territorial sea, the contiguous zone and the continental shelf. The 'straight line drawn at 240°' is a loxodromic line." (Para. 88.)

19. Mr. Barberis, President of the Arbitration Tribunal, appended a declaration to the Award, and Mr. Bedjaoui, who had voted against the Award, appended a dissenting opinion. The declaration of President Barberis read as follows:

> "I feel that the reply given by the Tribunal to the first question put by the Arbitration Agreement could have been more precise. I would have replied to that question as follows:
>
> > 'The Agreement concluded by an exchange of letters of 26 April 1960, and relating to the maritime boundary, has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal with respect to the territorial sea, the contiguous zone and the continental shelf, but does not have the force of law with respect to the waters of the exclusive economic zone or the fishery zone. The "straight line drawn at 240°" mentioned in the Agreement of 26 April 1960 is a loxodromic line.'
>
> This partially affirmative and partially negative reply is, in my view, the exact description of the legal position existing between the Parties. As suggested by Guinea-Bissau in the course of the present arbitration (Reply, p. 248), this reply would have enabled the Tribunal to deal in its Award with the second question put by the Arbitration Agreement. The *partially* negative reply to the first question would have conferred on the Tribunal a *partial* competence to reply to the second, i.e., to do so to the extent that the reply to the first question would have been negative.
>
> In that case, the Tribunal would have been competent to delimit the

> la zone économique exclusive* ou la zone de pêche entre les deux pays. De cette façon, le Tribunal aurait pu trancher le différend d'une manière complète car, en vertu de la réponse à la première question du compromis arbitral, il aurait déterminé la limite pour la mer territoriale, la zone contiguë et le plateau continental, comme la sentence vient de le faire, et, moyennant la réponse à la deuxième question, le Tribunal aurait pu déterminer la limite pour les eaux de la zone économique exclusive ou la zone de pêche, limite qui aurait pu ou non coïncider avec la ligne établie par l'accord de 1960.
>
> ---
>
> * Je me réfère aux «eaux» de la zone économique exclusive et je crois nécessaire d'apporter cette précision car il arrive parfois que cette notion englobe aussi le plateau continental comme, par exemple, à l'article 56 de la convention de Montego Bay de 1982.»

20. Dans son opinion dissidente, M. Bedjaoui s'est référé à la déclaration de M. Barberis, laquelle, selon lui,

> «montre combien la sentence est incomplète et non conforme à la lettre et à l'esprit du compromis quant à la ligne unique voulue par les Parties. Emanant du président du Tribunal lui-même, cette déclaration, par son existence autant que par son contenu, justifie de s'interroger plus fondamentalement sur l'existence d'une majorité et la réalité de la sentence.» (Par. 161.)

21. Le Tribunal a tenu une séance publique le 31 juillet 1989 pour rendre sa sentence; M. Barberis, président, et M. Bedjaoui, arbitre, y étaient présents, mais non M. Gros. A cette séance, après le prononcé, le représentant de la Guinée-Bissau a déclaré qu'en attendant une lecture complète des documents et la consultation de son gouvernement, il réservait la position de la Guinée-Bissau quant à l'applicabilité et à la validité de la sentence, qui ne répondait pas, selon lui, aux exigences posées d'un commun accord par les deux Parties. A la suite de contacts entre les gouvernements des Parties au cours desquels la Guinée-Bissau a exposé les motifs qu'elle avait de ne pas accepter la sentence, le Gouvernement de la Guinée-Bissau a introduit la présente instance devant la Cour.

* * *

22. La Cour examinera d'abord la question de sa compétence. Dans sa requête, la Guinée-Bissau fonde la compétence de la Cour sur les «déclarations par lesquelles la République de Guinée-Bissau et la République du Sénégal ont accepté respectivement la juridiction de la Cour dans les conditions prévues à l'article 36, paragraphe 2, du Statut» de la Cour. Ces déclarations ont été déposées auprès du Secrétaire général de l'Organisation des Nations Unies, le 2 décembre 1985 dans le cas du Sénégal et le 7 août 1989 dans le cas de la Guinée-Bissau. La déclaration de la Guinée-Bissau ne contenait pas de réserves. La déclaration du Sénégal, qui remplaçait une déclaration antérieure du 3 mai 1985, disposait que

> «le Sénégal peut renoncer à la compétence de la Cour au sujet:
>
> — des différends pour lesquels les parties seraient convenues d'avoir recours à un autre mode de règlement;

> waters of the exclusive economic zone* or the fishery zone between the two countries. The Tribunal thus could have settled the whole of the dispute, because, by virtue of the reply to the first question of the Arbitration Agreement, it would have determined the boundaries for the territorial sea, the contiguous zone and the continental shelf, as the Award has just done and, by its answer to the second question, the Tribunal could have determined the boundary for the waters of the exclusive economic zone or the fishery zone, a boundary which might or might not have coincided with the line drawn by the 1960 Agreement.
>
> ---
>
> * I refer to the 'waters' of the exclusive economic zone and I think it necessary to be as specific as this, because it sometimes occurs that the notion of this zone covers also the continental shelf as, for example, in Article 56 of the 1982 Montego Bay Convention."

20. In his dissenting opinion, Mr. Bedjaoui referred to the declaration by President Barberis, which, he said,

> "shows to what an extent the Award is incomplete and inconsistent with the letter and spirit of the Arbitration Agreement with regard to the single line desired by the Parties. Since it emanates from the President of the Tribunal himself, that Declaration, by its very existence as well as by its contents, justifies more fundamental doubts as to the existence of a majority and the reality of the Award." (Para. 161.)

21. A public sitting of the Tribunal was held on 31 July 1989 for delivery of the Award, at which President Barberis and Mr. Bedjaoui were present, but not Mr. Gros. At that sitting, after the Award had been delivered, the representative of Guinea-Bissau indicated that, pending full reading of the documents and consultation with his Government, he reserved the position of Guinea-Bissau regarding the applicability and validity of the Award, as he alleged that it did not satisfy the requirements laid down by agreement between the two Parties. After contacts between the Governments of the two Parties, in which Guinea-Bissau indicated its reasons for not accepting the Award, the present proceedings were brought before the Court by Guinea-Bissau.

* * *

22. The Court will first consider its jurisdiction. In its Application, Guinea-Bissau founds the jurisdiction of the Court on "the Declarations by which the Republic of Guinea-Bissau and the Republic of Senegal have respectively accepted the jurisdiction of the Court under the conditions set forth in Article 36, paragraph 2, of the Statute" of the Court. These declarations were deposited with the Secretary-General of the United Nations, in the case of Senegal on 2 December 1985, and in the case of Guinea-Bissau on 7 August 1989. Guinea-Bissau's declaration contained no reservation; Senegal's declaration, which replaced a previous declaration of 3 May 1985, provided that

> "Senegal may reject the Court's competence in respect of:
>
> — Disputes in regard to which the parties have agreed to have recourse to some other method of settlement;

— des différends relatifs à des questions qui, d'après le droit international, relèvent de la compétence exclusive du Sénégal ».

Cette déclaration précisait aussi qu'elle est applicable seulement à « tous les différends d'ordre juridique nés postérieurement à la présente déclaration... »

23. Le Sénégal a fait observer que si la Guinée-Bissau devait contester la décision du Tribunal arbitral quant au fond, elle soulèverait là une question qui, aux termes de la déclaration du Sénégal, est exclue de la compétence de la Cour. En effet, selon le Sénégal, le différend relatif à la délimitation maritime a fait l'objet du compromis d'arbitrage du 12 mars 1985 et rentre par suite dans la catégorie des différends pour lesquels les Parties sont « convenues d'avoir recours à un autre mode de règlement ». En outre, de l'avis du Sénégal, ce différend est né avant le 2 décembre 1985, date à laquelle l'acceptation par le Sénégal de la juridiction obligatoire de la Cour a pris effet, et se trouve ainsi exclu de la catégorie des différends « nés postérieurement » à cette déclaration.

24. Toutefois, les Parties ont reconnu qu'il y avait lieu de distinguer le différend de fond qui les oppose relativement à la délimitation maritime, de celui qui concerne la sentence rendue par le Tribunal, et que seul ce dernier différend, qui est né postérieurement à la déclaration du Sénégal, fait l'objet de la présente instance devant la Cour. La Guinée-Bissau a aussi adopté la position, acceptée par le Sénégal, selon laquelle la présente instance ne doit pas être considérée comme un appel de la sentence ou comme une demande en revision de celle-ci. Ainsi, les Parties reconnaissent qu'aucun aspect du différend de fond relatif à la délimitation n'est en cause. Sur cette base, le Sénégal n'a pas contesté que la Cour est compétente pour connaître de la requête en vertu du paragraphe 2 de l'article 36 du Statut. Dans les circonstances de l'espèce, la Cour considère sa compétence comme établie.

25. A cet égard, la Cour soulignera que, comme les deux Parties en sont convenues, la présente instance constitue une action en inexistence et en nullité de la sentence rendue par le Tribunal, et non un appel de ladite sentence ou une demande en revision de celle-ci. Comme la Cour a eu l'occasion de le relever à propos du grief en nullité présenté dans l'affaire de la *Sentence arbitrale rendue par le roi d'Espagne le 23 décembre 1906*:

> « la sentence n'étant pas susceptible d'appel, elle [la Cour] ne peut entreprendre l'examen des objections soulevées par le Nicaragua à la validité de la sentence comme le ferait une cour d'appel. La Cour n'est pas appelée à dire si l'arbitre a bien ou mal jugé. Ces considérations et celles qui s'y rattachent sont sans pertinence pour les fonctions que la Cour est chargée de remplir dans la présente procédure et qui sont de dire s'il est prouvé que la sentence est nulle et de nul effet. » (*C.I.J. Recueil 1960*, p. 214.)

* *

— Disputes with regard to questions which, under international law, fall exclusively within the jurisdiction of Senegal."

That declaration was also expressed as being applicable solely to "all legal disputes arising after the present declaration . . ."

23. Senegal observed that if Guinea-Bissau were to challenge the decision of the Arbitration Tribunal on the merits, it would be raising a question excluded from the Court's jurisdiction by the terms of Senegal's declaration. According to Senegal, the dispute concerning the maritime delimitation was the subject of the Arbitration Agreement of 12 March 1985 and consequently fell into the category of disputes "in regard to which the parties have agreed to have recourse to some other method of settlement". Furthermore, in the view of Senegal, that dispute arose before 2 December 1985, the date on which Senegal's acceptance of the compulsory jurisdiction of the Court became effective, and is thus excluded from the category of disputes "arising after" that declaration.

24. However, the Parties were agreed that there was a distinction between the substantive dispute relating to maritime delimitation, and the dispute relating to the Award rendered by the Arbitration Tribunal, and that only the latter dispute, which arose after the Senegalese declaration, is the subject of the present proceedings before the Court. Guinea-Bissau also took the position, which Senegal accepted, that these proceedings were not intended by way of appeal from the Award or as an application for revision of it. Thus, both Parties recognize that no aspect of the substantive delimitation dispute is involved. On this basis, Senegal did not dispute that the Court had jurisdiction to entertain the Application under Article 36, paragraph 2, of the Statute. In the circumstances of the case the Court regards its jurisdiction as established.

25. In this respect the Court would emphasize that, as the Parties were both agreed, these proceedings allege the inexistence and nullity of the Award rendered by the Arbitration Tribunal and are not by way of appeal from it or application for revision of it. As the Court had occasion to observe with respect to the contention of nullity advanced in the case of the *Arbitral Award Made by the King of Spain on 23 December 1906*:

> "the Award is not subject to appeal and . . . the Court cannot approach the consideration of the objections raised by Nicaragua to the validity of the Award as a Court of Appeal. The Court is not called upon to pronounce on whether the arbitrator's decision was right or wrong. These and cognate considerations have no relevance to the function that the Court is called upon to discharge in these proceedings, which is to decide whether the Award is proved to be a nullity having no effect." (*I.C.J. Reports 1960*, p. 214.)

* *

26. La Cour examinera maintenant une affirmation du Sénégal selon laquelle la requête de la Guinée-Bissau serait irrecevable, dans la mesure où elle viserait à utiliser la déclaration du président Barberis dans le but de jeter le doute sur la validité de la sentence (voir paragraphe 30 ci-après). Le Sénégal soutient que cette déclaration ne fait pas partie de la sentence et qu'en conséquence toute tentative de la Guinée-Bissau pour utiliser cette déclaration dans un tel but « doit être qualifiée d'abus de procédure, abus visant à priver le Sénégal des droits qui lui reviennent aux termes de la sentence ». Le Sénégal soutient aussi qu'il y a disproportion entre les moyens invoqués et les conclusions présentées et que l'instance a été introduite à l'effet de retarder la solution définitive du litige.

27. La Cour considère que la requête de la Guinée-Bissau a été présentée de manière appropriée dans le cadre des voies de droit qui lui sont ouvertes devant la Cour dans les circonstances de l'espèce. En conséquence, la Cour ne saurait accueillir la thèse du Sénégal selon laquelle la requête de la Guinée-Bissau ou les moyens qu'elle fait valoir à l'appui de celle-ci équivaudraient à un abus de procédure.

* *

28. La Guinée-Bissau soutient que l'absence de M. Gros lors de la séance du Tribunal arbitral au cours de laquelle la sentence a été lue constitue comme un aveu de l'échec du Tribunal à trancher le différend. La Guinée-Bissau admet que cette séance n'était

> « pas destinée à « statuer » et que par une interprétation formelle et stricte il serait possible de ne pas lui appliquer l'article 4, paragraphe 1 [du compromis d'arbitrage], exigeant que le Tribunal fût au complet... »

La Guinée-Bissau estime cependant qu'il s'agissait d'une séance du Tribunal d'une particulière importance et que l'absence de M. Gros a affaibli l'autorité du Tribunal.

29. La Cour relève qu'il n'est pas contesté que M. Gros a participé au vote lors de l'adoption de la sentence. Cette dernière devait être ensuite communiquée aux Parties. A cet égard, le paragraphe 1 de l'article 10 du compromis d'arbitrage prévoyait que, la sentence ayant été revêtue de la signature du président du Tribunal et du greffier, ce dernier devait remettre « une copie conforme établie dans les deux langues aux agents des deux Parties », ce qui a été fait. Une séance a été tenue, au cours de laquelle la sentence a été lue. L'absence de M. Gros lors de cette séance ne pouvait affecter la validité de la sentence antérieurement adoptée.

* * *

30. La Cour abordera maintenant les conclusions de la Guinée-Bissau selon lesquelles la sentence arbitrale est inexistante ou, subsidiairement, entachée de nullité absolue. A l'appui de sa thèse principale selon laquelle

26. The Court will now consider a contention by Senegal that Guinea-Bissau's Application is inadmissible, insofar as it seeks to use the declaration of President Barberis for the purpose of casting doubt on the validity of the Award (see paragraph 30 below). Senegal argues that that declaration is not part of the Award, and therefore that any attempt by Guinea-Bissau to make use of it for that purpose "must be regarded as an abuse of process aimed at depriving Senegal of the rights belonging to it under the Award". Senegal also contends that the remedies sought are disproportionate to the grounds invoked and that the proceedings have been brought for the purpose of delaying the final solution of the dispute.

27. The Court considers that Guinea-Bissau's Application has been properly presented in the framework of its right to have recourse to the Court in the circumstances of the case. Accordingly, it does not accept Senegal's contention that Guinea-Bissau's Application, or the arguments used in support of it, amount to an abuse of process.

* *

28. Guinea-Bissau contends that the absence of Mr. Gros from the meeting of the Arbitration Tribunal at which the Award was pronounced amounted to a recognition that the Tribunal had failed to resolve the dispute. Guinea-Bissau accepts that at this meeting

> "it was not intended that a 'decision' should be taken, and by a formal and strict interpretation it would be possible to avoid applying to it Article 4, paragraph 1 [of the Arbitration Agreement], requiring that the Tribunal be in its full composition . . .".

Guinea-Bissau however takes the view that this was a particularly important meeting of the Tribunal and that the absence of Mr. Gros lessened the Tribunal's authority.

29. The Court notes that it is not disputed that Mr. Gros participated in the voting when the Award was adopted. Thereafter the Award had to be delivered to the Parties. In this respect Article 10, paragraph 1, of the Arbitration Agreement provided that the Award having been signed by the President and the Registrar, the Registrar was to "hand to the Agents of the two Parties a certified copy in the two languages". This was done. A meeting was held at which the Award was read. The absence of Mr. Gros from that meeting could not affect the validity of the Award which had already been adopted.

* * *

30. The Court will now examine the submissions of Guinea-Bissau that the Arbitral Award is inexistent, or subsidiarily that it is absolutely null and void. In support of its principal contention, that the Award is inexis-

la sentence est frappée d'inexistence, la requérante soutient que la sentence n'était pas fondée sur une majorité véritable. La Guinée-Bissau ne conteste pas que, selon le texte de la sentence, celle-ci avait été adoptée par les votes du président Barberis et de M. Gros; mais elle soutient que la déclaration du président Barberis contredisait et invalidait son vote, ôtant ainsi à la sentence le fondement d'une majorité véritable. Le Tribunal, ayant conclu, en réponse à la première question posée dans le compromis d'arbitrage, que l'accord de 1960 «fait droit dans les relations entre» les Parties, a jugé qu'il en était ainsi «en ce qui concerne les seules zones mentionnées dans cet accord, à savoir la mer territoriale, la zone contiguë et le plateau continental...» (sentence, par. 88). La Guinée-Bissau a fait toutefois remarquer que, dans sa déclaration, le président Barberis a précisé qu'il aurait répondu à la question de façon à dire que l'accord faisait droit dans les relations entre les Parties «en ce qui concerne la mer territoriale, la zone contiguë et le plateau continental, mais [qu']il ne fait pas droit quant aux eaux de la zone économique exclusive ou à la zone de pêche...» (ci-dessus paragraphe 19).

31. La Cour considère qu'en avançant cette formulation le président Barberis avait à l'esprit le fait que la réponse du Tribunal à la première question «aurait», selon les termes qu'il a employés, «pu être plus précise», et non qu'elle aurait dû être plus précise dans le sens indiqué par sa formulation; cette dernière était, à son avis, une formulation préférable mais non obligatoire. De l'avis de la Cour, cette formulation ne révèle aucune contradiction avec celle de la sentence.

32. La Guinée-Bissau a aussi appelé l'attention sur le fait que le président Barberis a dit que sa propre formulation «aurait habilité le Tribunal à traiter dans la sentence la deuxième question posée par le compromis arbitral» et qu'en conséquence le Tribunal «aurait été compétent pour délimiter les eaux de la zone économique exclusive ou la zone de pêche entre les deux pays», en plus des autres espaces. La Cour estime que l'opinion exprimée par le président Barberis selon laquelle la réponse qu'il aurait lui-même donnée à la première question aurait habilité le Tribunal à trancher la seconde question constituait, non une position qu'il avait adoptée quant à ce que le Tribunal était dans l'obligation de faire, mais seulement une indication de ce qui, à son avis, aurait été une meilleure façon de procéder. Sa position ne pouvait donc pas être considérée comme étant en contradiction avec celle adoptée dans la sentence.

33. En outre, même s'il y avait eu, pour l'une ou l'autre des deux raisons qu'invoque la Guinée-Bissau, une contradiction quelconque entre l'opinion exprimée par le président Barberis et celle indiquée dans la sentence, une telle contradiction ne pouvait prévaloir contre la position que le président Barberis avait prise lorsqu'il avait voté pour la sentence. En donnant son accord à la sentence, il a définitivement accepté les décisions que celle-ci contenait quant à l'étendue des espaces maritimes regis par l'accord de 1960, et quant au fait que le Tribunal n'était pas tenu de répondre à la seconde question, vu la réponse qu'il avait donnée à la première. Comme le montre la pratique des juridictions internationales, il arrive

tent, the Applicant claims that the Award was not supported by a real majority. Guinea-Bissau does not dispute the fact that the Award was expressed to have been adopted by the votes of President Barberis and Mr. Gros; it contends however that President Barberis's declaration contradicted and invalidated his vote, thus leaving the Award unsupported by a real majority. The Tribunal, having concluded, in reply to the first question in the Arbitration Agreement, that the 1960 Agreement "has the force of law in the relations between" the Parties, held that that was so "with regard solely to the areas mentioned in that Agreement, namely, the territorial sea, the contiguous zone and the continental shelf . . ." (Award, para. 88). However, Guinea-Bissau drew attention to the fact that, in his declaration, President Barberis stated that he would have replied to the effect that the Agreement had the force of law in the relations between the Parties "with respect to the territorial sea, the contiguous zone and the continental shelf, but does not have the force of law with respect to the waters of the exclusive economic zone or the fishery zone . . ." (paragraph 19 above).

31. The Court considers that, in putting forward this formulation, what President Barberis had in mind was that the Tribunal's answer to the first question "could have been more precise" — to use his own words —, not that it had to be more precise in the sense indicated in his formulation, which was, in his view, a preferable one, not a necessary one. In the opinion of the Court, the formulation discloses no contradiction with that of the Award.

32. Guinea-Bissau also drew attention to the fact that President Barberis expressed the view that his own formulation "would have enabled the Tribunal to deal in its Award with the second question put by the Arbitration Agreement" and that the Tribunal would in consequence "have been competent to delimit the waters of the exclusive economic zone or the fishery zone between the two countries", in addition to the other areas. The Court considers that the view expressed by President Barberis, that the reply which he would have given to the first question would have enabled the Tribunal to deal with the second question, represented, not a position taken by him as to what the Tribunal was required to do, but only an indication of what he considered would have been a better course. His position therefore could not be regarded as standing in contradiction with the position adopted by the Award.

33. Furthermore, even if there had been any contradiction, for either of the two reasons relied on by Guinea-Bissau, between the view expressed by President Barberis and that stated in the Award, such contradiction could not prevail over the position which President Barberis had taken when voting for the Award. In agreeing to the Award, he definitively agreed to the decisions, which it incorporated, as to the extent of the maritime areas governed by the 1960 Agreement, and as to the Tribunal not being required to answer the second question in view of its answer to the first. As the practice of international tribunals shows, it sometimes happens that a member of a tribunal votes in favour of a decision of the tribu-

parfois qu'un membre d'un tribunal vote en faveur de la décision de ce tribunal, même si, personnellement, il aurait été enclin à préférer une autre solution. La validité d'un tel vote n'est pas affectée par des divergences de ce genre exprimées dans une déclaration ou dans une opinion individuelle du membre concerné, qui sont dès lors sans conséquence sur la décision du tribunal.

34. Par suite, de l'avis de la Cour, la thèse de la Guinée-Bissau selon laquelle la sentence est frappée d'inexistence pour défaut de majorité véritable ne peut être accueillie.

* * *

35. A titre subsidiaire, la Guinée-Bissau soutient que la sentence est frappée dans son ensemble de nullité absolue à la fois pour excès de pouvoir et défaut de motivation. La Guinée-Bissau observe que le Tribunal n'a pas répondu à la seconde question posée à l'article 2 du compromis d'arbitrage et n'a pas joint à la sentence la carte prévue à l'article 9 du compromis. Cette double omission constituerait un excès de pouvoir. Par ailleurs, aucune motivation n'aurait été donnée par le Tribunal à sa décision de ne pas passer à la seconde question, à la non-production d'une ligne unique de délimitation et au refus de porter le tracé de cette ligne sur une carte.

36. La Cour examinera les griefs tant d'excès de pouvoir que de défaut de motivation que la Guinée-Bissau tire de l'absence de réponse à la seconde question posée par le compromis, avant d'aborder ceux concernant l'absence de carte.

* *

37. Dans la première perspective, la Cour rappellera tout d'abord, pour plus de commodité, que selon l'article 2 du compromis :

> « Il est demandé au Tribunal de statuer conformément aux normes du droit international sur les questions suivantes :
>
> 1. L'accord conclu par un échange de lettres, le 26 avril 1960, et relatif à la frontière en mer, fait-il droit dans les relations entre la République de Guinée-Bissau et la République du Sénégal ?
>
> 2. En cas de réponse négative à la première question, quel est le tracé de la ligne délimitant les territoires maritimes qui relèvent respectivement de la République de Guinée-Bissau et de la République du Sénégal ? »

38. La sentence, après divers développements liminaires, analyse les raisons sur lesquelles la Guinée-Bissau se fondait pour affirmer que l'accord de 1960 ne faisait pas droit dans ses relations avec le Sénégal (par. 35-79). Elle conclut en son paragraphe 80 que « l'accord de 1960 est

nal even though he might individually have been inclined to prefer another solution. The validity of his vote remains unaffected by the expression of any such differences in a declaration or separate opinion of the member concerned, which are therefore without consequence for the decision of the tribunal.

34. Accordingly, in the opinion of the Court, the contention of Guinea-Bissau that the Award was inexistent for lack of a real majority cannot be accepted.

* * *

35. Subsidiarily, Guinea-Bissau maintains that the Award is, as a whole, null and void, on the grounds of *excès de pouvoir* and of insufficiency of reasoning. Guinea-Bissau observes that the Tribunal did not reply to the second question put in Article 2 of the Arbitration Agreement, and did not append to the Award the map provided for in Article 9 of that Agreement. It is contended that these two omissions constitute an *excès de pouvoir*. Furthermore, no reasons, it is said, were given by the Tribunal for its decision not to proceed to the second question, for not producing a single delimitation line, and for refusing to draw that line on a map.

36. The Court will examine Guinea-Bissau's contentions, whether presented as of *excès de pouvoir* or as lack of reasoning, which are based on the absence of a reply to the second question put by the Arbitration Agreement, before dealing with those relating to the absence of a map.

* *

37. On this first point, the Court would, for convenience, recall at the outset that, according to Article 2 of the Arbitration Agreement:

> "The Tribunal is requested to decide in accordance with the norms of international law on the following questions:
>
> 1. Does the Agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?
> 2. In the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively?"

38. The Award, after dealing with some preliminary matters, analyses the grounds upon which Guinea-Bissau based its assertions that the 1960 Agreement did not have the force of law in its relations with Senegal (paras. 35-79). The conclusion in paragraph 80 of the Award is that "the

valable et opposable au Sénégal et à la Guinée-Bissau». Puis elle aborde aux paragraphes 80 à 86 «le domaine de validité matériel de l'accord de 1960» et énonce que:

> «l'accord de 1960 ne délimite pas les espaces maritimes qui n'existaient pas à cette date, qu'on les appelle zone économique exclusive, zone de pêche ou autrement.
>
> . . . .
>
> Par contre, en ce qui concerne la mer territoriale, la zone contiguë et le plateau continental, la question se présente tout autrement. Ces trois notions sont expressément mentionnées dans l'accord de 1960 et elles existaient à l'époque de sa conclusion.»

La sentence ajoute que, pour les motifs exposés dans le passage cité au paragraphe 16 ci-dessus,

> «l'accord franco-portugais délimite le plateau continental entre les Parties dans toute l'étendue de la définition actuelle de cet espace maritime».

Puis la sentence poursuit en son paragraphe 87:

> « En tenant compte des conclusions ci-dessus auxquelles le Tribunal est parvenu et du libellé de l'article 2 du compromis arbitral, la deuxième question, de l'avis du Tribunal, n'appelle pas une réponse de sa part.»

Enfin, le paragraphe 88 de la sentence dispose en sa première phrase:

> « Vu les motifs qui ont été exposés, le Tribunal *décide* par deux voix contre une:
>
> De répondre à la première question formulée dans l'article 2 du compromis arbitral de la façon suivante: l'accord conclu par un échange de lettres, le 26 avril 1960, et relatif à la frontière en mer, fait droit dans les relations entre la République de Guinée-Bissau et la République du Sénégal en ce qui concerne les seules zones mentionnées dans cet accord, à savoir la mer territoriale, la zone contiguë et le plateau continental.»

39. Se plaignant de ce que le Tribunal n'a pas apporté de réponse à la seconde question figurant à l'article 2 du compromis, la Guinée-Bissau développe à cet égard une triple argumentation: elle se demande si le Tribunal a réellement pris la décision de ne pas fournir une telle réponse; elle prétend que, à supposer qu'il y ait eu une décision, celle-ci était insuffisamment motivée; enfin elle en conteste le bien-fondé.

*

40. Pour ce qui est du premier de ces trois arguments, la Guinée-Bissau suggère que le Tribunal aurait non pas décidé de ne pas répondre à la

1960 Agreement is valid and can be opposed to Senegal and to Guinea-Bissau". The Award then deals, in paragraphs 80 to 86, with "the scope of substantive validity of the 1960 Agreement" and states that:

> "the 1960 Agreement does not delimit those maritime spaces which did not exist at that date, whether they be termed exclusive economic zone, fishery zone or whatever.
>
> . . . .
>
> On the other hand, the position regarding the territorial sea, the contiguous zone and the continental shelf is quite different. These three concepts are expressly mentioned in the 1960 Agreement and they existed at the time of its conclusion."

The Award goes on to say that, for the reasons explained in the passage quoted in paragraph 16 above,

> "the Franco-Portuguese Agreement delimits the continental shelf between the Parties over the whole extent of that maritime space as defined at present".

Then the Award continues, in paragraph 87:

> "Bearing in mind the above conclusions reached by the Tribunal and the actual wording of Article 2 of the Arbitration Agreement, in the opinion of the Tribunal it is not called upon to reply to the second question."

Finally, paragraph 88 of the Award declares in its first sentence that:

> "For the reasons stated above, the Tribunal *decides* by two votes to one:
>
> To reply as follows to the first question formulated in Article 2 of the Arbitration Agreement: The Agreement concluded by an exchange of letters on 26 April 1960, and relating to the maritime boundary, has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal with regard solely to the areas mentioned in that Agreement, namely the territorial sea, the contiguous zone and the continental shelf."

39. Guinea-Bissau's complaint on the ground that the Tribunal did not give an answer to the second question in Article 2 of the Arbitration Agreement involves three arguments. It questions whether the Tribunal really took a decision not to give an answer; it contends that, even if there was such a decision, there was insufficient reasoning in support of it; and, finally, it contests the validity of any such decision.

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40. As to the first of these three arguments, Guinea-Bissau suggests that what the Tribunal did was not to decide not to answer the second question

seconde question qui lui était posée, mais qu'il aurait simplement omis, faute de majorité véritable, de prendre quelque décision que ce soit sur ce point. Dans cette perspective, la Guinée-Bissau souligne que ce qui est, selon la première phrase du paragraphe 87 de la sentence, un « avis du Tribunal » sur la question ne se trouve que dans les motifs et non dans le dispositif de la sentence; que cette dernière ne précise pas à quelle majorité ce paragraphe aurait été adopté; et que seul M. Gros aurait pu voter pour ce paragraphe; elle se demande, compte tenu de la déclaration du président Barberis, si un vote est bien intervenu sur le paragraphe 87.

41. La Cour reconnaît que la sentence est de ce point de vue construite d'une manière qui pourrait donner prise à la critique. L'article 2 du compromis posait deux questions au Tribunal. Ce dernier, d'après l'article 9, devait faire « connaître aux deux gouvernements sa décision quant aux questions énoncées à l'article 2 ». Dès lors, il eût été normal de faire figurer dans le dispositif de la sentence, au paragraphe final de cette dernière, tant la réponse fournie à la première question que la décision prise de ne pas répondre à la seconde. Il est regrettable qu'il n'ait pas été procédé de la sorte. Toutefois le Tribunal, en adoptant la sentence par deux voix contre une, a par là même non seulement approuvé le contenu du paragraphe 88, mais encore l'a fait pour les motifs exposés antérieurement dans la sentence et en particulier dans le paragraphe 87. Il ressort clairement de ce dernier paragraphe pris dans son contexte, comme d'ailleurs de la déclaration du président Barberis, que le Tribunal a jugé par deux voix contre une, qu'ayant répondu affirmativement à la première question, il n'avait pas à répondre à la seconde. Ce faisant le Tribunal a bien pris une décision : celle de ne pas répondre à la seconde question qui lui était posée. La sentence n'est entachée d'aucune omission de statuer.

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42. La Guinée-Bissau expose en deuxième lieu que toute sentence arbitrale doit, conformément au droit international général, être motivée. En outre, selon le paragraphe 3 de l'article 9 du compromis, les Parties avaient convenu au cas particulier que « la décision sera pleinement motivée ». Or, selon la Guinée-Bissau, le Tribunal n'aurait en l'espèce donné aucune motivation pour fonder son refus de répondre à la seconde question posée par les Parties ou, à tout le moins, aurait retenu une motivation « absolument insuffisante ». Celle-ci ne permettrait « même pas de déterminer le raisonnement qui aurait été suivi » et ne répondrait « en aucun point aux questions posées et discutées pendant la procédure arbitrale ». Sur ce terrain encore la sentence serait nulle.

43. Au paragraphe 87 déjà cité, le Tribunal, « tenant compte des conclusions » auxquelles il était parvenu et « du libellé de l'article 2 du compromis », a estimé que la seconde question qui lui avait été posée n'appelait pas de réponse de sa part. La motivation ainsi retenue est brève et aurait pu être plus développée. Mais les renvois opérés par le paragraphe 87 tant aux conclusions du Tribunal qu'au libellé de l'article 2 du

put to it; it simply omitted, for lack of a real majority, to reach any decision at all on the issue. In this respect Guinea-Bissau stresses that what is referred to in the first sentence of paragraph 87 of the Award as an "opinion of the Tribunal" on the point appears in the statement of reasoning, not in the operative clause of the Award; that the Award does not specify the majority by which that paragraph would have been adopted; and that only Mr. Gros could have voted in favour of this paragraph. In the light of the declaration made by President Barberis, Guinea-Bissau questions whether any vote was taken on paragraph 87.

41. The Court recognizes that the structure of the Award is, in that respect, open to criticism. Article 2 of the Arbitration Agreement put two questions to the Tribunal; and the Tribunal was, according to Article 9, to "inform the two Governments of its decision regarding the questions set forth in Article 2". Consequently, it would have been normal to include in the operative part of the Award, i.e., in a final paragraph, both the answer given to the first question and the decision not to answer the second. It is to be regretted that this course was not followed. However, when the Tribunal adopted the Award by two votes to one, it was not only approving the content of paragraph 88, but was also doing so for the reasons already stated in the Award and, in particular, in paragraph 87. It is clear from that paragraph, taken in its context, and also from the declaration of President Barberis, that the Tribunal decided by two votes to one that, as it had given an affirmative answer to the first question, it did not have to answer the second. By so doing, the Tribunal did take a decision: namely, not to answer the second question put to it. The Award is not flawed by any failure to decide.

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42. Guinea-Bissau argues, secondly, that any arbitral award must, in accordance with general international law, be a reasoned one. Moreover, according to Article 9, paragraph 3, of the Arbitration Agreement, the Parties had specifically agreed that "the Award shall state in full the reasons on which it is based". Yet, according to Guinea-Bissau, the Tribunal in this case did not give any reasoning in support of its refusal to reply to the second question put by the Parties or, at the very least, gave "wholly insufficient" reasoning, which did not even make it possible to "determine the line of argument followed" and did not "reply on any point to the questions raised and discussed during the arbitral proceedings". On this ground also, it is claimed that the Award is null and void.

43. In paragraph 87 of the Award, referred to above, the Tribunal, "bearing in mind the . . . conclusions" that it had reached, together with "the wording of Article 2 of the Arbitration Agreement", took the view that it was not called upon to reply to the second question put to it. This reasoning is brief, and could doubtless have been developed further. But the references in paragraph 87 to the Tribunal's conclusions and to the

compromis n'en permettent pas moins de déterminer sans aucune difficulté les raisons qui ont conduit le Tribunal à ne pas répondre à la seconde question. En se référant au libellé de l'article 2 du compromis, le Tribunal constatait que, selon cet article, il lui était demandé en premier lieu si l'accord de 1960 « fait droit dans les relations » entre la Guinée-Bissau et le Sénégal, puis, « en cas de réponse négative à la première question, quel est le tracé de la ligne délimitant les territoires maritimes » des deux pays. En se référant aux conclusions auxquelles il était parvenu, le Tribunal constatait qu'il avait, aux paragraphes 80 et suivants de la sentence, estimé que l'accord de 1960, dont il avait fixé le domaine de validité matériel, était « valable et opposable au Sénégal et à la Guinée-Bissau ». Ayant apporté une réponse affirmative à la première question et s'attachant au texte même du compromis, le Tribunal jugeait par voie de conséquence qu'il n'avait pas à répondre à la seconde. Cette motivation, bien que ramassée, est claire et précise. Le deuxième argument de la Guinée-Bissau doit lui aussi être écarté.

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44. La Guinée-Bissau conteste en troisième lieu la valeur du raisonnement ainsi retenu par le Tribunal sur la question de savoir s'il était tenu de répondre à la seconde question. Dans cette perspective, la Guinée-Bissau fait valoir deux moyens : d'une part le compromis correctement interprété aurait exigé qu'il soit répondu à la seconde question quelle que soit la réponse fournie à la première; d'autre part et en tout état de cause une réponse à la seconde question aurait été nécessaire du fait que la réponse à la première était en l'espèce partiellement négative.

45. La Guinée-Bissau soutient tout d'abord que le compromis avait été conclu sur la base d'un accord sur

> « la nécessité de poser au Tribunal une double question afin de s'assurer que, quelle que soit la réponse relative à la valeur de l'échange de lettres franco-portugais, la tâche du Tribunal serait bien de procéder à une délimitation complète des territoires maritimes ».

Or, de l'avis de la Guinée-Bissau, même si le Tribunal avait confirmé la validité et l'opposabilité de l'accord de 1960, il n'en serait pas résulté une délimitation complète, alors qu'une telle délimitation par une ligne unique constituait l'objet et le but du compromis. Aussi la Guinée-Bissau soutient-elle en fait que ce compromis faisait obligation au Tribunal de répondre à la seconde question quelle que fût sa réponse à la première.

46. A ce sujet, la Cour tient à rappeler dès l'abord

> « une règle que le droit international commun a consacrée en matière d'arbitrage international. Depuis l'affaire de l'*Alabama*, il est admis, conformément à des précédents antérieurs, qu'à moins de conven-

wording of Article 2 of the Arbitration Agreement make it possible to determine, without difficulty, the reasons why the Tribunal decided not to answer the second question. By referring to the wording of Article 2 of the Arbitration Agreement, the Tribunal was taking note that, according to that Article, it was asked, first, whether the 1960 Agreement had "the force of law in the relations" between Guinea-Bissau and Senegal, and then, "in the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories" of the two countries. By referring to the conclusions that it had already reached, the Tribunal was noting that it had, in paragraphs 80 *et seq.* of the Award, found that the 1960 Agreement, in respect of which it had already determined the scope of its substantive validity, was "valid and can be opposed to Senegal and to Guinea-Bissau". Having given an affirmative answer to the first question, and basing itself on the actual text of the Arbitration Agreement, the Tribunal found as a consequence that it did not have to reply to the second question. That statement of reasoning, while succinct, is clear and precise. The second contention of Guinea-Bissau must also be dismissed.

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44. Thirdly, Guinea-Bissau challenges the validity of the reasoning thus adopted by the Tribunal on the issue whether it was required to answer the second question. In this respect Guinea-Bissau presents two arguments: first that the Arbitration Agreement, on its true construction, required an answer to the second question whatever might have been its reply to the first; secondly, that in any event an answer to the second question was required because the answer to the first question was in fact partially negative.

45. Guinea-Bissau's first argument is that the Arbitration Agreement was concluded on the basis of an agreement

> "that a two-fold question should be posed to the Tribunal, in order to ensure that whatever [the Tribunal's] reply concerning the value of the Franco-Portuguese exchange of letters, the Tribunal would be called upon to proceed to a comprehensive delimitation of the maritime territories".

In the view of Guinea-Bissau, even if the Tribunal upheld the validity and opposability of the 1960 Agreement, the effect would not be to produce a complete delimitation, and a complete delimitation by a single line was the object and purpose of the Arbitration Agreement. Accordingly, Guinea-Bissau is in effect contending that that Agreement required the Tribunal to answer the second question whatever was its answer to the first.

46. In this connection the Court would first recall

> "a rule consistently accepted by general international law in the matter of international arbitration. Since the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the

> tion contraire, un tribunal international est juge de sa propre compétence et a le pouvoir d'interpréter à cet effet les actes qui gouvernent celle-ci. » (*Nottebohm, exception préliminaire, arrêt, C.I.J. Recueil 1953*, p. 119.)

Aussi bien au cas particulier le paragraphe 2 de l'article 4 du compromis avait-il confirmé que le Tribunal arbitral avait compétence pour statuer sur sa compétence et interpréter pour ce faire le compromis.

47. Par le moyen susmentionné, la Guinée-Bissau critique en réalité l'interprétation donnée dans la sentence des dispositions du compromis qui déterminent la compétence du Tribunal, et en propose une autre. Mais la Cour n'a pas à se demander si le compromis était susceptible ou non de plusieurs interprétations en ce qui concerne la compétence du Tribunal, et dans l'affirmative à s'interroger sur celle qui eût été préférable. En procédant de la sorte, la Cour traiterait en effet la requête comme un appel et non comme un recours en nullité. La Cour ne saurait procéder de la sorte en l'espèce. Elle doit seulement rechercher si le Tribunal, en rendant la sentence contestée, a manifestement méconnu la compétence qui lui avait été donnée par le compromis, en outrepassant sa compétence ou en ne l'exerçant pas.

48. Une telle méconnaissance manifeste pourrait par exemple résulter de ce que le Tribunal n'aurait pas correctement appliqué les règles pertinentes d'interprétation aux dispositions du compromis gouvernant sa compétence. Tout compromis d'arbitrage constitue un accord entre Etats qui doit être interprété selon les règles du droit international général régissant l'interprétation des traités. A cet égard,

> « le premier devoir d'un tribunal, appelé à interpréter et à appliquer les dispositions d'un traité, est de s'efforcer de donner effet, selon leur sens naturel et ordinaire, à ces dispositions prises dans leur contexte. Si les mots pertinents, lorsqu'on leur attribue leur signification naturelle et ordinaire, ont un sens dans leur contexte, l'examen doit s'arrêter là. En revanche, si les mots, lorsqu'on leur attribue leur signification naturelle et ordinaire, sont équivoques ou conduisent à des résultats déraisonnables, c'est alors — et alors seulement — que la Cour doit rechercher par d'autres méthodes d'interprétation ce que les parties avaient en réalité dans l'esprit quand elles se sont servies des mots dont il s'agit. » (*Compétence de l'Assemblée générale pour l'admission d'un Etat aux Nations Unies, avis consultatif, C.I.J. Recueil 1950*, p. 8.)

La règle d'interprétation selon le sens naturel et ordinaire des termes employés n'est pas

> « absolue. Lorsque cette méthode d'interprétation aboutit à un résultat incompatible avec l'esprit, l'objet et le contexte de la clause ou de l'acte où les termes figurent, on ne saurait valablement lui accorder

> absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction." (*Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 119.)

In the present case, Article 4, paragraph 2, of the Arbitration Agreement confirmed that the Tribunal had the power to determine its own jurisdiction and to interpret the Agreement for that purpose.

47. By its argument set out above, Guinea-Bissau is in fact criticizing the interpretation in the Award of the provisions of the Arbitration Agreement which determine the Tribunal's jurisdiction, and proposing another interpretation. However, the Court does not have to enquire whether or not the Arbitration Agreement could, with regard to the Tribunal's competence, be interpreted in a number of ways, and if so to consider which would have been preferable. By proceeding in that way the Court would be treating the request as an appeal and not as a *recours en nullité*. The Court could not act in that way in the present case. It has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction.

48. Such manifest breach might result from, for example, the failure of the Tribunal properly to apply the relevant rules of interpretation to the provisions of the Arbitration Agreement which govern its competence. An arbitration agreement *(compromis d'arbitrage)* is an agreement between States which must be interpreted in accordance with the general rules of international law governing the interpretation of treaties. In that respect

> "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words." (*Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 8.)

The rule of interpretation according to the natural and ordinary meaning of the words employed

> "is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no

> crédit.» (*Sud-Ouest africain, exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 336.)

Ces principes se trouvent traduits dans les articles 31 et 32 de la convention de Vienne sur le droit des traités qui, à bien des égards, peuvent être considérés sur ce point comme une codification du droit international coutumier existant.

49. Par ailleurs les Etats, en signant un compromis d'arbitrage, concluent un accord ayant un objet et un but bien particuliers : confier à un tribunal arbitral le soin de trancher un différend selon les termes convenus par les parties. Ces dernières fixent dans l'accord la compétence du tribunal et en déterminent les limites. Dans l'exercice de la tâche qui lui est confiée, le tribunal « doit s'en tenir aux termes par lesquels les Parties ont défini celle-ci » (*Délimitation de la frontière maritime dans la région du golfe du Maine, arrêt, C.I.J. Recueil 1984*, p. 266, par. 23).

50. Dans la présente affaire, l'article 2 du compromis posait une première question concernant l'accord de 1960, puis une seconde question relative à la délimitation. Il devait être répondu à la seconde question « en cas de réponse négative à la première question ». La Cour note que ces derniers mots, proposés en leur temps par la Guinée-Bissau elle-même, sont catégoriques. La situation en l'espèce est différente de celle dans laquelle la Cour ou des tribunaux arbitraux ont pu se trouver lorsqu'ils ont eu à répondre à des questions successives non conditionnées les unes par les autres et à chacune desquelles il convenait en tout état de cause de donner un sens afin qu'une réponse leur soit fournie, comme, par exemple, dans l'affaire des *Zones franches de la Haute-Savoie et du Pays de Gex* (*ordonnance du 19 août 1929, C.P.J.I. série A nº 22*, p. 13) ou dans celle du *Détroit de Corfou, fond* (*arrêt, C.I.J. Recueil 1949*, p. 24). Toutefois, lorsque des questions successives, conditionnées les unes par les autres, ont été posées à la Cour, cette dernière a répondu, ou n'a pas jugé possible de répondre, selon que la condition requise était ou non remplie, comme, par exemple, dans les affaires relatives à l'*Interprétation de l'accord gréco-bulgare du 9 décembre 1927* (*avis consultatif, 1932, C.P.J.I. série A/B nº 45*, p. 70, 86-87) et à l'*Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie* (*première phase, avis consultatif, C.I.J. Recueil 1950*, p. 65, 67-68, 75, 76, 77 ; *deuxième phase, avis consultatif, ibid.*, p. 225, 226, 230).

51. En réalité les Parties auraient pu utiliser en l'espèce une expression telle que le Tribunal aurait dû répondre à la seconde question « compte tenu » de la réponse apportée à la première, mais elles ne l'ont pas fait ; elles ont spécifié qu'il fallait répondre à cette seconde question seulement « en cas de réponse négative » à la première. La formulation était à cet égard très différente de celle figurant dans un autre compromis d'arbitrage auquel la Guinée-Bissau est partie, le compromis conclu le 18 février 1983 entre la République de Guinée et la Guinée-Bissau. En effet, dans ce compromis ces deux Etats demandaient à un autre tribunal de se prononcer sur la valeur juridique et la portée d'une autre convention franco-

> reliance can be validly placed on it." (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 336.)

These principles are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point.

49. Furthermore, when States sign an arbitration agreement, they are concluding an agreement with a very specific object and purpose: to entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits. In the performance of the task entrusted to it, the tribunal "must conform to the terms by which the Parties have defined this task" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 266, para. 23).

50. In the present case, Article 2 of the Arbitration Agreement presented a first question concerning the 1960 Agreement, and then a second question relating to delimitation. A reply had to be given to the second question "in the event of a negative answer to the first question". The Court notes that those last words, which were originally proposed by Guinea-Bissau itself, are categorical. The situation in the present case differs from that faced by the Court or by arbitral tribunals when they had to reply to successive questions which were not made conditional on each other, and to each of which some meaning had in any event to be attributed in order for a reply to be given thereto, as for example in the case of the *Free Zones of Upper Savoy and the District of Gex* (*Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13), or *Corfu Channel, Merits* (*Judgment, I.C.J. Reports 1949*, p. 24). Where, however, successive questions were put to the Court which were made conditional on each other, the Court replied, or found no room to reply, according to whether or not the governing condition had been fulfilled, as, for example, in *Interpretation of the Greco-Bulgarian Agreement of 9 December 1927* (*Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 45*, pp. 70, 86-87); and *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (*First Phase, Advisory Opinion, I.C.J. Reports 1950*, pp. 65, 67-68, 75, 76, 77; *Second Phase, Advisory Opinion, ibid.*, pp. 225, 226, 230).

51. In fact in the present case the Parties could have used some such expression as that the Tribunal should answer the second question "taking into account" the reply given to the first, but they did not; they directed that the second question should be answered only "in the event of a negative answer" to that first question. In that respect, the wording was very different from that to be found in another Arbitration Agreement to which Guinea-Bissau is a party, that concluded on 18 February 1983 with the Republic of Guinea. By that Agreement, those two States asked another tribunal to decide on the legal value and scope of another Franco-Portuguese delimitation convention and annexed documents, and then,

portugaise de délimitation et de documents annexes, puis « selon les réponses données » à ces premières questions, de fixer le « tracé de la ligne délimitant les territoires maritimes » des deux pays.

52. Confrontée au problème posé par les mots introductifs de la seconde question, la requérante souligne que, selon le préambule du compromis, ce dernier avait pour objet le règlement du différend existant entre les deux pays et relatif à la détermination de leur frontière maritime. La première phrase de l'article 2 demandait au Tribunal de statuer sur les deux questions posées. Le Tribunal devait, selon l'article 9, faire « connaître aux deux gouvernements sa décision quant aux questions énoncées à l'article 2 ». Cette décision devait « comprendre le tracé de la ligne frontière sur une carte ». D'après la Guinée-Bissau, le Tribunal était dès lors tenu de délimiter par une ligne unique l'ensemble des espaces maritimes relevant de l'un et l'autre Etat. Comme, pour les motifs donnés par le Tribunal, la réponse qu'il apportait à la première question posée dans le compromis ne pouvait conduire à une délimitation complète, il s'ensuivait, de l'avis de la Guinée-Bissau, que, nonobstant les mots introductifs de la seconde question, le Tribunal était tenu de répondre à cette dernière et de procéder à la délimitation complète voulue par les Parties.

53. En vue d'apprécier la valeur de cette argumentation, il n'est pas inutile de rappeler dans quelles conditions le compromis a été élaboré. A la suite de divers incidents, le Sénégal et la Guinée-Bissau ont mené, de 1977 à 1985, des négociations concernant leur frontière maritime. Deux thèses se sont alors opposées : le Sénégal soutenait que l'accord conclu en 1960 entre la France, en son nom propre et au nom de la communauté, et le Portugal faisait droit dans les relations entre les deux pays en vertu des règles relatives à la succession d'Etats et que la ligne fixée par cet accord déterminait la frontière maritime. La Guinée-Bissau estimait quant à elle que cet accord était inexistant et nul et, en tout état de cause, ne lui était pas opposable. Elle en déduisait qu'il convenait de procéder *ex novo* à une délimitation maritime entre les deux pays. Lorsque vint le moment de rédiger le compromis d'arbitrage, le Sénégal proposa que le Tribunal se prononce exclusivement sur la question de savoir si l'accord de 1960 faisait droit dans les relations entre les Parties. La Guinée-Bissau demanda pour sa part que le Tribunal soit seulement chargé de tracer la ligne délimitant les territoires maritimes en litige. Après de longues discussions, un accord intervint pour que soit posée en premier lieu au Tribunal la question proposée par le Sénégal. La Guinée-Bissau suggéra en outre qu'« en cas de réponse négative à la première question » le Tribunal soit chargé de fixer le tracé de la ligne de délimitation. Cette formulation fut finalement retenue.

54. On voit que les deux questions avaient des objets tout différents. La première concernait le point de savoir si un accord international faisait droit dans les relations entre les Parties ; la seconde visait à procéder à une délimitation maritime pour le cas où cet accord ne ferait pas droit. Le Sénégal escomptait une réponse positive à la première question et en concluait qu'en pareil cas la ligne droite orientée à 240° retenue par

"according to the answers given" to those initial questions, to determine the "course of the boundary between the maritime territories" of the two countries.

52. Faced with the problem presented by the prefatory words of the second question, the Applicant stresses that, according to the Preamble of the Arbitration Agreement, its object was to settle the dispute that had arisen between the two countries relating to the determination of their maritime boundary. The first sentence of Article 2 requested the Tribunal to decide on the two questions put to it. The Tribunal was, according to Article 9, to "inform the two Governments of its decision regarding the questions set forth in Article 2". That decision was to "include the drawing of the boundary line on a map". According to Guinea-Bissau, the Tribunal was therefore required to delimit by a single line the whole of the maritime areas appertaining to each State. As, for the reasons given by the Tribunal, its answer to the first question put in the Arbitration Agreement could not lead to a comprehensive delimitation, it followed, in Guinea-Bissau's view, that, notwithstanding the prefatory words to the second question the Tribunal was required to answer that question and to effect the overall delimitation desired by both Parties.

53. It is useful to recall, in order to assess the weight of that line of argument, the circumstances in which the Arbitration Agreement was drawn up. Following various incidents, Senegal and Guinea-Bissau engaged in negotiations, from 1977 to 1985, with regard to their maritime boundary. Two opposing views were asserted. Senegal maintained that the Agreement concluded in 1960 between France, on its own behalf and that of the *Communauté*, and Portugal had the force of law in the relations between the two States, by virtue of the rules relating to State succession, and that the line defined by that Agreement defined the boundary. Guinea-Bissau however considered that that Agreement was inexistent, null and void, and in any case not opposable to it. From this it inferred that it would be appropriate to proceed *ex novo* to a maritime delimitation between the two States. When the time came to draft the Arbitration Agreement, Senegal proposed that the Tribunal should decide solely whether the 1960 Agreement had the force of law in the relations between the Parties. Guinea-Bissau asked that the Tribunal should be entrusted only with the task of drawing the line delimiting the maritime territories in dispute. After lengthy discussions, it was agreed that there should first be put to the Tribunal the question proposed by Senegal. Guinea-Bissau suggested in addition that, "in the event of a negative answer to the first question", the Tribunal should be asked to define the course of the delimitation line. That form of words was ultimately adopted.

54. It will be apparent that the two questions had a completely different subject matter. The first concerned the issue whether an international agreement had the force of law in the relations between the Parties, while the second was directed to a maritime delimitation in the event that that agreement did not have such force. Senegal was counting on an affirmative reply to the first question, and concluded that the straight line on a

l'accord de 1960 constituerait la ligne unique séparant l'ensemble des espaces maritimes des deux pays. La Guinée-Bissau escomptait une réponse négative à la première question et en concluait qu'une ligne séparative unique pour l'ensemble des espaces maritimes des deux Etats serait fixée *ex novo* par le Tribunal en réponse à la seconde question. Les deux Etats entendaient obtenir une délimitation de l'ensemble de leurs espaces maritimes par une ligne unique. Mais le Sénégal comptait atteindre ce résultat grâce à une réponse affirmative à la première question et la Guinée-Bissau grâce à une réponse négative à cette même question. Aucun accord n'était intervenu entre les Parties sur ce qui adviendrait, dans l'hypothèse où une réponse affirmative ne conduirait qu'à une délimitation partielle, et sur la tâche à confier éventuellement au Tribunal en pareil cas. Les travaux préparatoires confirment par suite le sens ordinaire de l'article 2.

55. La Cour considère que cette conclusion n'est pas en désaccord avec le fait que le Tribunal s'est donné le titre de « Tribunal arbitral pour la détermination de la frontière maritime, Guinée-Bissau/Sénégal », ou qu'il a, au paragraphe 27 de la sentence, précisé que « le seul objet du différend ... porte ... sur la détermination de la frontière maritime entre la République du Sénégal et la République de Guinée-Bissau, question qu'elles n'ont pu résoudre par voie de négociation... » De l'avis de la Cour, ce titre et cette définition doivent être lus à la lumière de la conclusion du Tribunal, que la Cour partage, suivant laquelle, s'il est vrai qu'il entrait dans la mission de celui-ci d'effectuer la délimitation de tous les territoires maritimes des Parties, cette tâche ne lui incombait que dans le cadre de la seconde question et « en cas de réponse négative à la première question ».

56. En définitive, si les deux Etats avaient exprimé de manière générale, dans le préambule du compromis, leur désir de parvenir à un règlement de leur différend, ils n'y avaient consenti que dans les termes prévus à l'article 2 du compromis. Par voie de conséquence, le Tribunal n'a pas méconnu manifestement sa compétence en ce qui concerne sa propre compétence, en jugeant qu'il n'était pas tenu de répondre à la seconde question, sauf en cas de réponse négative à la première. Le premier moyen doit être écarté.

57. La Cour va examiner maintenant le deuxième moyen présenté par la Guinée-Bissau. Indépendamment de sa thèse, selon laquelle une interprétation exacte du compromis exigeait que l'on passât à l'examen de la seconde question quelle que fût la réponse donnée à la première, la Guinée-Bissau soutient que la réponse que le Tribunal a donnée en l'espèce à la première question était une réponse partiellement négative et que cela suffisait à remplir la condition prescrite pour aborder l'examen de la seconde question. Dès lors, et comme le démontrerait la déclaration du président Barberis, le Tribunal aurait à la fois eu le droit et le devoir de répondre à la seconde question.

58. Il est de fait que le Tribunal a répondu à la première question au paragraphe 88 de la sentence en précisant que l'accord de 1960 faisait

bearing of 240°, adopted by the 1960 Agreement, would constitute the single line separating the whole of the maritime areas of the two countries. Guinea-Bissau was counting on a negative answer to the first question, and concluded that a single dividing line for the whole of the maritime areas of the two countries would be fixed *ex novo* by the Tribunal in reply to the second question. The two States intended to obtain a delimitation of the whole of their maritime areas by a single line. But Senegal was counting on achieving this result through an affirmative answer to the first question, and Guinea-Bissau through a negative answer to that question. No agreement had been reached between the Parties as to what should happen in the event of an affirmative answer leading only to a partial delimitation, and as to what might be the task of the Tribunal in such case. The *travaux préparatoires* accordingly confirm the ordinary meaning of Article 2.

55. The Court considers that this conclusion is not at variance with the circumstance that the Tribunal adopted as its title "Arbitration Tribunal for the Determination of the Maritime Boundary: Guinea-Bissau/Senegal", or with its definition, in paragraph 27 of the Award, of the "sole object of the dispute" as being one relating to "the determination of the maritime boundary between the Republic of Senegal and the Republic of Guinea-Bissau, a question which they have not been able to settle by means of negotiation . . .". In the opinion of the Court, that title and that definition are to be read in the light of the Tribunal's conclusion, which the Court shares, that, while its mandate did include the making of a delimitation of all the maritime areas of the Parties, this fell to be done only under the second question and "in the event of a negative answer to the first question".

56. In short, although the two States had expressed in general terms in the Preamble of the Arbitration Agreement their desire to reach a settlement of their dispute, their consent thereto had only been given in the terms laid down by Article 2. Consequently the Tribunal did not act in manifest breach of its competence to determine its own jurisdiction by deciding that it was not required to answer the second question except in the event of a negative answer to the first. The first argument must be rejected.

57. The Court now turns to Guinea-Bissau's second argument. Apart from its contention that, on a true construction, the Arbitration Agreement required recourse to the second question whatever was the answer to the first, Guinea-Bissau argues that the answer in fact given by the Tribunal to the first question was a partially negative answer and that this sufficed to satisfy the prescribed condition for entering into the second question. Accordingly, and as was to be shown by the declaration of President Barberis, the Tribunal was, it is said, both entitled and bound to answer the second question.

58. It is true that the Arbitration Tribunal, when answering the first question, in paragraph 88 of the Award, explained that the 1960 Agree-

droit dans les relations entre les Parties «en ce qui concerne les seules zones mentionnées dans cet accord, à savoir la mer territoriale, la zone contiguë et le plateau continental». Par voie de conséquence, «l'accord de 1960 ne délimite pas les espaces maritimes qui n'existaient pas à cette date, qu'on les appelle zone économique exclusive, zone de pêche ou autrement» (sentence, par. 85).

59. Le président Barberis, dans sa déclaration annexée à la sentence, reproduite au paragraphe 19 ci-dessus, avait ajouté qu'il aurait pour sa part préféré qu'au paragraphe 88 de la sentence il soit répondu de manière affirmative en ce qui concerne les espaces délimités par l'accord de 1960 et négative en ce qui concerne les espaces non délimités par ledit accord. A son avis, une telle formulation partiellement négative aurait attribué au Tribunal une compétence partielle pour répondre à la seconde question et pour déterminer la limite des eaux de la zone économique exclusive ou de la zone de pêche entre les deux pays.

60. La Cour observe en premier lieu que le Tribunal n'a pas, au paragraphe 88 de sa sentence, adopté la formulation qui aurait eu les préférences du président Barberis. La Guinée-Bissau ne saurait donc fonder son argumentation sur une rédaction qui en définitive n'a pas été retenue par le Tribunal. En réalité, ce dernier a jugé, en réponse à la première question, que l'accord de 1960 faisait droit dans les relations entre les Parties, tout en précisant la portée matérielle dudit accord. Une telle réponse ne permettait pas d'aboutir à une délimitation de l'ensemble des espaces maritimes des deux Etats et de régler entièrement le différend existant entre eux. Elle aboutissait à une délimitation partielle. Mais elle n'en était pas moins une réponse complète et affirmative à la première question; elle reconnaissait que l'accord de 1960 faisait droit dans les relations entre le Sénégal et la Guinée-Bissau. Dès lors, le Tribunal a pu, sans méconnaître manifestement sa compétence, juger que la réponse qu'il avait donnée à la première question n'était pas négative, et que par suite il n'avait pas compétence pour répondre à la seconde. A cet égard également, l'argumentation de la Guinée-Bissau selon laquelle la sentence dans son ensemble est frappée de nullité doit être écartée.

* *

61. La Guinée-Bissau rappelle enfin que, selon le paragraphe 2 de l'article 9 du compromis, la décision du Tribunal devait «comprendre le tracé de la ligne frontière sur une carte», et qu'une telle carte n'a pas été établie par le Tribunal. La Guinée-Bissau soutient que ce dernier n'aurait en outre pas motivé suffisamment sa décision sur ce point. La sentence devrait pour ces derniers motifs être considérée comme nulle dans son ensemble.

62. La Cour observe que la sentence énonce que l'accord de 1960 «détermine clairement la frontière maritime pour ce qui a trait à la mer territoriale, à la zone contiguë et au plateau continental» en retenant

ment had the force of law in the relations between the Parties "with regard solely to the areas mentioned in that Agreement, namely the territorial sea, the contiguous zone and the continental shelf". Consequently "the 1960 Agreement does not delimit those maritime spaces which did not exist at that date, whether they be termed exclusive economic zone, fishery zone or whatever" (Award, para. 85).

59. In his declaration appended to the Award reproduced in paragraph 19 above, President Barberis added that he would have preferred that, in paragraph 88 of the Award, an affirmative answer be given with respect to the areas delimited by the 1960 Agreement, and a negative answer with respect to the areas not delimited by that Agreement. In his opinion, such a partially negative wording would have conferred on the Tribunal a partial competence to reply to the second question, and to determine the boundary of the waters of the exclusive economic zones or fishery zones between the two countries.

60. The Court would first observe that the Tribunal did not, in paragraph 88 of its Award, adopt the form of words that President Barberis would have preferred. Guinea-Bissau thus cannot base its arguments upon a form of words that was not in fact adopted by the Tribunal. The Tribunal found, in reply to the first question, that the 1960 Agreement had the force of law in the relations between the Parties, and at the same time it defined the substantive scope of that Agreement. Such an answer did not permit of a delimitation of the whole of the maritime areas of the two States, and a complete settlement of the dispute between them. It achieved a partial delimitation. But that answer was nonetheless both a complete and an affirmative answer to the first question; it recognized that the Agreement of 1960 had the force of law in the relations between Senegal and Guinea-Bissau. The Tribunal could thus find, without manifest breach of its competence, that its answer to the first question was not a negative one, and that it was therefore not competent to answer the second question. In this respect also, the contention of Guinea-Bissau that the entire Award is a nullity must be rejected.

* *

61. Finally, Guinea-Bissau recalls that, according to Article 9, paragraph 2, of the Arbitration Agreement, the decision of the Tribunal was to "include the drawing of the boundary line on a map", and that no such map was produced by the Arbitration Tribunal. Guinea-Bissau contends that the Tribunal also did not give sufficient reasons for its decision on that point. It is contended that the Award should, for these reasons, be considered wholly null and void.

62. The Court observes that the Award states that the 1960 Agreement "clearly determines the maritime boundary as regards the territorial sea, the contiguous zone and the continental shelf" by adopting "a straight line

« une ligne droite orientée à 240° » (par. 80 et 85). La sentence indique que cette formulation « permet d'écarter toute ligne géodésique », de sorte que la ligne devrait être loxodromique, ce qui est d'ailleurs conforme au « croquis attaché aux travaux préparatoires de l'accord de 1960 » (par. 86 et 88). Puis, après avoir décidé de ne pas répondre à la seconde question, la décision ajoute : « Au surplus, le Tribunal n'a pas jugé utile, étant donné sa décision, de joindre une carte comprenant le tracé de la ligne frontière. »

63. La Cour ne saurait accueillir la thèse selon laquelle la motivation du Tribunal était insuffisante sur ce point. La motivation rappelée ci-dessus est, là encore, brève, mais suffisante pour éclairer les Parties et la Cour sur les raisons qui ont guidé le Tribunal. Ce dernier a estimé que la ligne frontière fixée par l'accord de 1960 était une ligne loxodromique orientée à 240° partant du point d'intersection du prolongement de la frontière terrestre et de la laisse de basse mer des deux pays, représenté à cet effet par le phare du cap Roxo. Ne répondant pas à la seconde question, il n'a eu à fixer aucune autre ligne. Dès lors, il lui est apparu inutile de faire porter sur une carte une ligne connue de tous et dont il avait précisé les ultimes caractéristiques.

64. Compte tenu de la rédaction des articles 2 et 9 du compromis et des positions prises par les Parties devant le Tribunal, on pourrait discuter de la question de savoir si, en l'absence de réponse à la seconde question, le Tribunal était dans l'obligation de dresser la carte prévue au compromis. Mais la Cour n'estime pas nécessaire d'entrer dans un tel débat. En effet, et en tout état de cause, l'absence de carte ne saurait constituer dans les circonstances de l'espèce une irrégularité de nature à entacher la sentence arbitrale d'invalidité. Le dernier grief de la Guinée-Bissau ne saurait dès lors être accueilli.

65. Les conclusions de la Guinée-Bissau doivent par suite être écartées. La sentence arbitrale du 31 juillet 1989 est valable et obligatoire pour la République du Sénégal et la République de Guinée-Bissau, qui sont tenues de l'appliquer.

* * *

66. La Cour n'en constate pas moins que la sentence n'a pas abouti à une délimitation complète des espaces maritimes qui relèvent respectivement de la Guinée-Bissau et du Sénégal. Mais elle observe que ce résultat trouve son origine dans la rédaction retenue à l'article 2 du compromis.

67. La Cour a par ailleurs pris note du fait que la Guinée-Bissau a déposé au Greffe de la Cour, le 12 mars 1991, une seconde requête lui demandant de dire et juger :

> « Quel doit être, sur la base du droit international de la mer et de tous les éléments pertinents de l'affaire, y compris la future décision

drawn at 240° " (paras. 80 and 85). The Award states that this terminology "makes it possible to rule out any geodesic line", so that the line would have to be a loxodromic line, which, moreover is in accordance with the "sketch included in the preparatory work of the 1960 Agreement" (paras. 86 and 88). Then, after deciding not to answer the second question, the Tribunal adds that: "Furthermore, in view of its decision, the Tribunal considered that there was no need to append a map showing the course of the boundary line."

63. The Court is unable to uphold the contention that the reasoning of the Tribunal was insufficient on this point. The reasoning mentioned above is, once again, brief but sufficient to enlighten the Parties and the Court as to the reasons that guided the Tribunal. It found that the boundary line fixed by the 1960 Agreement was a loxodromic line drawn at 240° from the point of intersection of the prolongation of the land frontier and the low-water line of the two countries, represented for that purpose by the Cape Roxo lighthouse. Since it did not reply to the second question, it did not have to define any other line. It thus considered that there was no need to draw on a map a line which was common knowledge, and the definitive characteristics of which it had specified.

64. In view of the wording of Articles 2 and 9 of the Arbitration Agreement, and the positions taken by the Parties before the Arbitration Tribunal, it is open to argument whether, in the absence of a reply to the second question, the Tribunal was under an obligation to produce the map envisaged by the Arbitration Agreement. The Court does not however consider it necessary to enter into such a discussion. In the circumstances of the case, the absence of a map cannot in any event constitute such an irregularity as would render the Award invalid. The last argument of Guinea-Bissau is therefore also not accepted.

65. The submissions of Guinea-Bissau must accordingly be rejected. The Arbitral Award of 31 July 1989 is valid and binding upon the Republic of Senegal and the Republic of Guinea-Bissau, which have the obligation to apply it.

* * *

66. The Court nonetheless takes note of the fact that the Award has not brought about a complete delimitation of the maritime areas appertaining respectively to Guinea-Bissau and to Senegal. It would however observe that that result is due to the wording of Article 2 of the Arbitration Agreement.

67. The Court has moreover taken note of the fact that on 12 March 1991 Guinea-Bissau filed in the Registry of the Court a second Application requesting the Court to adjudge and declare:

> "What should be, on the basis of the international law of the sea and of all the relevant elements of the case, including the future

de la Cour dans l'affaire relative à la *«sentence»* arbitrale du 31 juillet 1989, le tracé (figuré sur une carte) délimitant l'ensemble des territoires maritimes relevant respectivement de la Guinée-bissau et du Sénégal.»

Elle a également pris note de la déclaration de l'agent du Sénégal dans la présente instance selon laquelle une

> «solution serait de négocier avec le Sénégal, qui ne s'y oppose pas, une frontière de la zone économique exclusive ou, si un accord n'est pas possible, de porter l'affaire devant la Cour».

68. Au vu de cette requête et de cette déclaration, et au terme d'une procédure arbitrale longue et difficile et de la présente procédure devant la Cour, cette dernière estime qu'il serait éminemment souhaitable que les éléments du différend non réglés par la sentence arbitrale du 31 juillet 1989 puissent l'être dans les meilleurs délais, ainsi que les deux Parties en ont exprimé le désir.

* * *

69. Par ces motifs,

LA COUR,

1) A l'unanimité,

Rejette les conclusions de la République de Guinée-Bissau selon lesquelles la sentence arbitrale rendue le 31 juillet 1989 par le Tribunal constitué en vertu du compromis du 12 mars 1985 entre la République de Guinée-Bissau et la République du Sénégal est frappée d'inexistence;

2) Par onze voix contre quatre,

Rejette les conclusions de la République de Guinée-Bissau selon lesquelles la sentence arbitrale du 31 juillet 1989 est frappée de nullité absolue;

POUR: sir Robert Jennings, *Président*; M. Oda, *Vice-Président*; MM. Lachs, Ago, Schwebel, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, *juges*; M. Mbaye, *juge* ad hoc;

CONTRE: MM. Aguilar Mawdsley, Weeramantry, Ranjeva, *juges*; M. Thierry, *juge* ad hoc;

3) Par douze voix contre trois,

Rejette les conclusions de la République de Guinée-Bissau selon lesquelles c'est à tort que le Gouvernement du Sénégal prétend imposer à celui de la Guinée-Bissau l'application de la sentence arbitrale du 31 juillet 1989; et, sur les conclusions présentées en ce sens par la République du

> decision of the Court in the case concerning the arbitral *'award'* of 31 July 1989, the line (to be drawn on a map) delimiting all the maritime territories appertaining respectively to Guinea-Bissau and Senegal."

It has also taken note of the declaration made by the Agent of Senegal in the present proceedings, according to which one solution

> "would be to negotiate with Senegal, which has no objection to this, a boundary for the exclusive economic zone or, should it prove impossible to reach an agreement, to bring the matter before the Court".

68. Having regard to that Application and that declaration, and at the close of a long and difficult arbitral procedure and of these proceedings before the Court, the Court considers it highly desirable that the elements of the dispute that were not settled by the Arbitral Award of 31 July 1989 be resolved as soon as possible, as both Parties desire.

* * *

69. For these reasons,

THE COURT,

(1) Unanimously,

Rejects the submission of the Republic of Guinea-Bissau that the Arbitral Award given on 31 July 1989 by the Arbitration Tribunal established pursuant to the Agreement of 12 March 1985 between the Republic of Guinea-Bissau and the Republic of Senegal, is inexistent;

(2) By eleven votes to four,

Rejects the submission of the Republic of Guinea-Bissau that the Arbitral Award of 31 July 1989 is absolutely null and void;

IN FAVOUR: *President* Sir Robert Jennings; *Vice-President* Oda; *Judges* Lachs, Ago, Schwebel, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen; *Judge* ad hoc Mbaye.

AGAINST: *Judges* Aguilar Mawdsley, Weeramantry, Ranjeva; *Judge* ad hoc Thierry.

(3) By twelve votes to three,

Rejects the submission of the Republic of Guinea-Bissau that the Government of Senegal is not justified in seeking to require the Government of Guinea-Bissau to apply the Arbitral Award of 31 July 1989; and, on the submission to that effect of the Republic of Senegal, *finds* that the Arbitral

Sénégal, *dit* que la sentence arbitrale du 31 juillet 1989 est valable et obligatoire pour la République du Sénégal et la République de Guinée-Bissau, qui sont tenues de l'appliquer.

POUR : sir Robert Jennings, *Président* ; M. Oda, *Vice-Président* ; MM. Lachs, Ago, Schwebel, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Ranjeva, *juges* ; M. Mbaye, *juge* ad hoc ;

CONTRE : MM. Aguilar Mawdsley, Weeramantry, *juges* ; M. Thierry, *juge* ad hoc.

Fait en français et en anglais, le texte français faisant foi, au Palais de la Paix, à La Haye, le douze novembre mil neuf cent quatre-vingt-onze, en trois exemplaires, dont l'un restera déposé aux archives de la Cour et les autres seront transmis respectivement au Gouvernement de la République de Guinée-Bissau et au Gouvernement de la République du Sénégal.

Le Président,
(Signé) R. Y. JENNINGS.

Le Greffier,
(Signé) Eduardo VALENCIA-OSPINA.

M. TARASSOV, juge, et M. MBAYE, juge *ad hoc*, joignent des déclarations à l'arrêt.

M. ODA, Vice-Président, et MM. LACHS, NI et SHAHABUDDEEN, juges, joignent à l'arrêt les exposés de leur opinion individuelle.

MM. AGUILAR MAWDSLEY et RANJEVA, juges, joignent à l'arrêt l'exposé de leur opinion dissidente commune ; M. WEERAMANTRY, juge, et M. THIERRY, juge *ad hoc*, y joignent les exposés de leur opinion dissidente.

(Paraphé) R.Y.J.
(Paraphé) E.V.O.

Award of 31 July 1989 is valid and binding for the Republic of Senegal and the Republic of Guinea-Bissau, which have the obligation to apply it.

IN FAVOUR: *President* Sir Robert Jennings; *Vice-President* Oda; *Judges* Lachs, Ago, Schwebel, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Ranjeva; *Judge* ad hoc Mbaye.

AGAINST: *Judges* Aguilar Mawdsley, Weeramantry; *Judge* ad hoc Thierry.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twelfth day of November, one thousand nine hundred and ninety-one, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Guinea-Bissau and the Government of the Republic of Senegal, respectively.

(Signed) R. Y. JENNINGS,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judge TARASSOV and Judge *ad hoc* MBAYE append declarations to the Judgment of the Court.

Vice-President ODA, Judges LACHS, NI and SHAHABUDDEEN append separate opinions to the Judgment of the Court.

Judges AGUILAR MAWDSLEY and RANJEVA append a joint dissenting opinion, and Judge WEERAMANTRY and Judge *ad hoc* THIERRY dissenting opinions, to the Judgment of the Court.

(Initialled) R.Y.J.
(Initialled) E.V.O.

DECLARATION OF JUDGE TARASSOV

I voted for the present Judgment bearing in mind that its sole purpose is to solve the dispute between the Republic of Guinea-Bissau and the Republic of Senegal, relating to the validity or nullity of the Award rendered on 31 July 1989 by the Arbitration Tribunal for the determination of the maritime boundary established on the basis of the Arbitration Agreement between the Parties on 12 March 1985. The Court did not examine — and was not asked by the Parties to examine — any of the circumstances and evidence relating to that same determination, including the delimitation line established in the Franco-Portuguese Exchange of Letters of 26 April 1960 and applicability of this document to the territorial dispute between two States. As was stated in the Judgment "both Parties recognize that no aspect of the substantive delimitation dispute is involved". Consequently, I consider the present Judgment to be for the most part of a procedural rather than a material character. From this point of view, I agree with the analysis and conclusions of the Court, which has found that the submissions and arguments of Guinea-Bissau against the existence or validity of the Award are not convincing.

As I express this agreement, I nonetheless feel obligated to declare that, in my opinion, the Award contains some serious deficiencies. Those deficiencies, while not providing a formal basis for a finding that it is null and void, call for some strong criticism which is partially reflected in the present Judgment.

In the Award, the Arbitration Tribunal did not accomplish the main task entrusted to it by the Parties, as it did not definitively settle the dispute about the delimitation of all adjacent maritime territories off the coasts of Senegal and Guinea-Bissau. The Arbitration Agreement leaves one in no doubt that neither Party regarded their different attitudes towards the 1960 Franco-Portuguese Agreement as constituting the main subject of their dispute. They recognized and defined their inability "to settle by means of diplomatic negotiation the dispute relating to the determination of their maritime boundary" and decided to resort to arbitration "to reach a settlement of that dispute as soon as possible" (Annex to the Application of Guinea-Bissau, Award, para. 1). The quintessence of the dispute was directly reflected in the very title of the Tribunal, i.e., "Arbitration Tribunal for the Determination of the Maritime Boundary: Guinea-Bissau/Senegal" (*ibid.*, p. 1).

The Tribunal itself recognized and specified in its Award that:

DÉCLARATION DE M. TARASSOV

[Traduction]

J'ai voté pour le présent arrêt en ayant à l'esprit que son seul but est de régler le différend entre la République de Guinée-Bissau et la République du Sénégal concernant la validité ou la nullité de la sentence rendue le 31 juillet 1989 par le Tribunal arbitral pour la détermination de la frontière maritime constitué sur la base du compromis d'arbitrage intervenu entre les Parties le 12 mars 1985. La Cour n'a pas examiné — et les Parties ne lui ont pas demandé de le faire — les circonstances et les faits se rapportant à cette détermination, y compris la ligne de délimitation établie dans l'échange de lettres entre la France et le Portugal du 26 avril 1960 et son applicabilité au différend territorial entre les deux Etats. Comme il est dit dans l'arrêt « les Parties reconnaissent qu'aucun aspect du différend de fond relatif à la délimitation n'est en cause ». En conséquence, le présent arrêt a à mon avis essentiellement un caractère de procédure plutôt que de fond. De ce point de vue, je souscris à l'analyse et aux conclusions de la Cour, qui a considéré que les moyens et les arguments avancés par la Guinée-Bissau pour contester l'existence ou la validité de la sentence ne sont pas convaincants.

Tout en manifestant mon accord, force est cependant pour moi de déclarer qu'à mon avis la sentence contient quelques graves lacunes. Ces lacunes, sans constituer une base formelle qui permettrait de considérer qu'elle est nulle, appellent un certain nombre de sérieuses critiques qui sont en partie reflétées dans le présent arrêt.

Dans la sentence, le Tribunal arbitral ne s'est pas acquitté de la principale tâche que lui avaient confiée les Parties, dans la mesure où il n'a pas définitivement réglé le différend touchant la délimitation de tous les territoires maritimes adjacents au large des côtes du Sénégal et de la Guinée-Bissau. Le compromis d'arbitrage ne laisse subsister aucun doute sur le fait que ni l'une ni l'autre des Parties ne considéraient leurs attitudes différentes en ce qui concerne l'accord franco-portugais de 1960 comme constituant le principal objet du différend. Reconnaissant et constatant qu'elles n'avaient pu « résoudre par voie de négociation diplomatique le différend relatif à la détermination de leur frontière maritime », les Parties ont décidé de recourir à un arbitrage pour « parvenir au règlement de ce différend dans les meilleurs délais » (annexe à la requête de la Guinée-Bissau, sentence, par. 1). L'essence du différend se reflétait directement dans le titre même du Tribunal, à savoir « Tribunal arbitral pour la détermination de la frontière maritime, Guinée-Bissau/Sénégal » (*ibid.*, p. 1).

Le Tribunal lui-même a reconnu et spécifié dans sa sentence que :

> "The sole object of the dispute submitted by the Parties to the Tribunal accordingly relates to the determination of the maritime boundary between the Republic of Senegal and the Republic of Guinea-Bissau, a question which they have not been able to settle by means of negotiation. *The case is one of a delimitation between adjacent maritime territories . . . off the coasts of Senegal and Guinea-Bissau.*" (Para. 27; emphasis added.)

Moreover, Article 9 of the Arbitration Agreement expressly requested the Tribunal, upon completion of the proceedings, to "inform the two Governments of its decision regarding *the questions* set forth in Article 2 of the present Agreement" (Annex to the Application of Guinea-Bissau, Award, para. 1; emphasis added). The wording of this part enables one to consider that the Tribunal had to inform the Parties of its decision regarding *both questions* put in Article 2 and that, in any event, that decision — whatever it might be — had to "include the drawing of the boundary line on a map" with the assistance of technical experts. It is important that the form of words employed in Article 9 is neither logically nor grammatically connected with the character — positive or negative — of the reply to the first question of Article 2 of the Arbitration Agreement.

I admit that the wording of the second question of Article 2 was such as to permit the Tribunal to decline to answer it, in the event of a positive answer to the first question — albeit on the basis of a purely *formal*, grammatical interpretation of that Article. The Tribunal pursued that course. However, in accordance with the jurisprudence of this Court, the judicial body

> "cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention [of the Parties]" (*I.C.J. Reports 1952*, p. 104).

And of course, the real intention of the Parties in the present case was to settle their dispute on the delimitation of *all* maritime territories, including the economic zone. The contention of the Tribunal in paragraph 87 of the Award that it is not called upon to reply to the second question because of "the actual wording of Article 2 of the Arbitration Agreement" does not, in my opinion, suffice to substantiate the decision on such an important issue.

As the Court said in the cases concerning *South West Africa* (Preliminary Objections):

> "This contention is claimed to be based upon the natural and ordinary meaning of the words employed in the provision. But this rule of interpretation is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it." (*I.C.J. Reports 1962*, p. 336.)

> « Le seul objet du différend soumis par les Parties au Tribunal porte donc sur la détermination de la frontière maritime entre la République du Sénégal et la République de Guinée-Bissau, question qu'ils n'ont pu résoudre par voie de négociation. *Il s'agit d'une délimitation entre territoires maritimes adjacents ... au large des côtes du Sénégal et de la Guinée-Bissau.* » (Par. 27 ; les italiques sont de moi.)

En outre, à l'article 9 du compromis d'arbitrage, le Tribunal a été expressément prié, lorsque les procédures auraient pris fin, de faire « connaître aux deux gouvernements sa décision quant *aux questions* énoncées à l'article 2 du présent compromis » (annexe à la requête de la Guinée-Bissau, sentence, par. 1 ; les italiques sont de moi). Le libellé de cette partie du compromis permet de considérer que le Tribunal devait informer les Parties de sa décision touchant *les deux questions* posées à l'article 2 et que, en tout état de cause, cette décision — quelle qu'elle fût — devait « comprendre le tracé de la ligne frontière sur une carte » avec l'aide d'experts techniques. Il importe de noter que la tournure employée à l'article 9 n'est pas liée, logiquement ou grammaticalement, au caractère — positif ou négatif — de la réponse donnée à la première question figurant à l'article 2 du compromis d'arbitrage.

Certes, le libellé de la seconde question figurant à l'article 2 était tel que le Tribunal pouvait s'abstenir d'y répondre au cas où il aurait donné une réponse positive à la première question, encore que ce soit seulement sur la base d'une interprétation purement *formelle* et grammaticale de cet article. C'est ce qu'a fait le Tribunal. Toutefois, conformément à la jurisprudence de la Cour, celle-ci

> « ne saurait se fonder sur une interprétation purement grammaticale du texte. Elle doit rechercher l'interprétation qui est en harmonie avec la manière naturelle et raisonnable de lire le texte, eu égard à l'intention [des Parties] » (*C.I.J. Recueil 1952*, p. 104).

Or, bien évidemment, l'intention réelle des Parties en l'espèce était de régler leur différend concernant la délimitation de *tous* les territoires maritimes, y compris la zone économique. A mon avis, l'affirmation du Tribunal, au paragraphe 87 de la sentence, qu'il n'a pas à répondre à la seconde question en raison « du libellé de l'article 2 du compromis d'arbitrage » ne suffit pas à fonder la décision prise sur une question aussi importante.

Comme la Cour l'a déclaré dans les affaires du *Sud-Ouest africain* (exceptions préliminaires) :

> « Cette thèse prétend se fonder sur le sens naturel et ordinaire des termes employés dans la disposition. Mais il ne s'agit pas là d'une règle d'interprétation absolue. Lorsque cette méthode d'interprétation aboutit à un résultat incompatible avec l'esprit, l'objet et le contexte de la clause ou de l'acte où les termes figurent, on ne saurait valablement lui accorder crédit. » (*C.I.J. Recueil 1962*, p. 336.)

I think that there is a serious foundation for the view expressed by the President of the Tribunal, Mr. J. Barberis, in the declaration attached to the Award, in which he stated his conviction that the Tribunal had the opportunity and competence to give a "partially affirmative and partially negative reply" to the first question put in Article 2 and, on that basis, to settle the whole of the dispute.

When it stated in the Award

> "that the 1960 Agreement does not delimit those maritime spaces which did not exist at that date, whether they be termed exclusive economic zone, fishery zone or whatever" (Annex to the Application of Guinea-Bissau, Award, para. 85),

the Tribunal did nothing for the delimitation of "those maritime spaces". When it decided that the "straight line drawn at 240° mentioned by the 1960 Agreement is a loxodromic line", the Tribunal did not state whether that line might or might not be used for the delimitation of the economic zone. Such an omission, together with the Tribunal's refusal to append a map (in contradiction with Article 9 of the Arbitration Agreement) did not, in my opinion, help to solve the whole dispute between the Parties and has merely paved the way to the new Application by Guinea-Bissau to the Court.

(Signed) Nikolai K. TARASSOV.

Il y a à mon sens de solides bases à l'avis exprimé par M. J. Barberis, président du Tribunal, dans la déclaration jointe à la sentence, dans laquelle il s'est déclaré convaincu que le Tribunal avait la possibilité et la compétence de donner une « réponse partiellement affirmative et partiellement négative » à la première question posée à l'article 2 et, ainsi, de régler le différend dans son ensemble.

Lorsqu'il a déclaré dans la sentence :

> « que l'accord de 1960 ne délimite pas les espaces maritimes qui n'existaient pas à cette date, qu'on les appelle zone économique exclusive, zone de pêche ou autrement » (annexe à la requête de la Guinée-Bissau, sentence, par. 85),

le Tribunal n'a aucunement contribué à la délimitation de « ces espaces maritimes ». Lorsqu'il a conclu que « la ligne droite orientée à 240° que vise l'accord de 1960 est une ligne loxodromique », le Tribunal n'a pas dit si cette ligne pouvait ou non être utilisée pour la délimitation de la zone économique. A mon avis, cette omission ainsi que le refus du Tribunal de joindre une carte (contrairement aux dispositions de l'article 9 du compromis d'arbitrage) n'ont pas aidé à régler l'ensemble du différend entre les Parties et ont simplement ouvert la voie à la nouvelle requête que la Guinée-Bissau a soumise à la Cour.

(Signé) Nikolai K. TARASSOV.

DÉCLARATION DE M. MBAYE

La présente affaire est une « Première ». En effet c'est la première fois qu'un Etat invoque devant la Cour, par voie d'action, la nullité d'une sentence arbitrale en se fondant sur les seules déclarations souscrites par les Parties en cause sur la base de l'article 36, paragraphe 2, du Statut de la Cour[1]. Il se posait donc à celle-ci une grave question de compétence. La Cour l'a située avec clarté et l'a résolue avec prudence. Elle a analysé en détail les déclarations déposées auprès du Secrétaire général de l'Organisation des Nations Unies le 2 décembre 1985 dans le cas du Sénégal et le 7 août 1989 dans le cas de la Guinée-Bissau. Elle a ensuite relevé que, dans le cas d'espèce, la Guinée-Bissau a accepté sa compétence et le Sénégal ne l'a pas contestée. Et c'est sur la base de l'ensemble de ces « circonstances » qu'elle a considéré sa compétence comme établie. C'est une sage attitude qui ne préjuge en rien sa position future. En effet, il ne semble pas que l'on puisse considérer l'article 36, paragraphe 2, sous les lettres *a)* et *b)*, comme « fournissant d'ores et déjà la base juridique, solide et incontestable pour la compétence de la Cour », écrit Eugène Borel (« Les voies de recours contre les sentences arbitrales », *Recueil des cours de l'Académie de droit international de La Haye*, t. 52, 1935, p. 75). Beaucoup d'autres auteurs ont partagé cette interrogation et certains y ont répondu par la négative. Je les approuve. Je ne vois pas pourquoi la Cour internationale de Justice s'érigerait automatiquement en cour de cassation pour tous les Etats qui ont souscrit la déclaration prévue à l'article 36, paragraphe 2, de son Statut, à l'égard de toutes les sentences arbitrales dans lesquelles ces Etats seraient parties, quand bien même elle se garderait dans chaque cas de se comporter comme une juridiction d'appel ou de revision. Le fait d'évoquer l'existence d'un « point de droit international » à trancher ne suffirait certainement pas pour justifier une telle incursion dans un autre mode de règlement des différends entre Etats. Ce serait assurément une aventure dont les conséquences dévastatrices ne se limiteraient pas aux seules décisions rendues par des arbitres. La Cour par bonheur s'est abstenue de s'y engager.

(Signé) Kéba MBAYE.

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[1] En effet la requête du Gouvernement du Honduras dans l'affaire de la *Sentence arbitrale rendue par le roi d'Espagne* (*C.I.J. Recueil 1960*, p. 194 et suiv.) était destinée à faire appliquer une sentence arbitrale et le Nicaragua (défendeur) avait notamment excipé de la nullité de ladite sentence. En l'espèce la convention de Washington passée entre les deux Etats le 21 juillet 1957 résolvait tout problème de compétence.

DECLARATION OF JUDGE MBAYE

[Translation]

The present case is a "first". It marks the first time that a State, as an applicant, invokes before the Court the nullity of an arbitral award on the sole basis of declarations made by the Parties to the case under Article 36, paragraph 2, of the Statute of the Court [1]. The Court was therefore confronted with a serious question of jurisdiction. It situated the question clearly and settled it prudently. The Court analysed in detail the declarations deposited with the Secretary-General of the United Nations on 2 December 1985 by Senegal and on 7 August 1989 by Guinea-Bissau. It then noted that, in the instant case, Guinea-Bissau had accepted its jurisdiction and Senegal had not contested it. And it is on the basis of these "circumstances", taken as a whole, that the Court considered its jurisdiction to have been founded. This is a judicious attitude that in no way prejudges the Court's future position. For, as pointed out by Eugène Borel ("Les voies de recours contre les sentences arbitrales", *Collected Courses of the Hague Academy of International Law,* Vol. 52, 1935, p. 75), it does not appear possible to consider that Article 36, paragraph 2, subparagraphs *(a)* and *(b),* "already provides a legal basis, sound and indisputable, for the jurisdiction of the Court". Many other authors have asked themselves whether it does and some have responded in the negative. I share their view. I fail to see why the International Court of Justice should automatically constitute itself as a *cour de cassation* for all States having made declarations under Article 36, paragraph 2, of its Statute, with respect to all arbitral awards in cases to which those States are parties, even if the Court were each time to take care not to act as a court of appeal or as one revising the award. That the need to decide a "question of international law" has been raised is surely not sufficient justification for such an inroad into another means of settlement of disputes between States. To deny this would be to embark on an adventure which would have disastrous consequences not confined to arbitral decisions. The Court has fortunately refused to take this path.

(Signed) Kéba MBAYE.

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[1] The Application of the Government of Honduras in the case concerning the *Arbitral Award Made by the King of Spain* (*I.C.J. Reports 1960*, pp. 194 *et seq.*) had as its object to enforce an arbitral award and Nicaragua (the defendant) had, in particular, pleaded the nullity of the award. In that case the Washington Agreement concluded by the two States on 21 July 1957 resolved any jurisdictional problem.

SEPARATE OPINION OF VICE-PRESIDENT ODA

1. I concur with the Court's decision to reject the submissions presented by Guinea-Bissau, but my reasons for rejection are much simpler than those expounded by the Court at some length. In my view, Guinea-Bissau simply misinterpreted, first, the declaration appended by the President of the Arbitration Tribunal to the Arbitral Award of 1989, in connection with its first submission that the Award should be held inexistent; secondly, the Arbitration Agreement itself, in connection with its second submission that the Award should be declared null and void. Furthermore, I cannot but point out that the whole procedure employed to settle the real issue in dispute in the mid-1980s between Guinea-Bissau and Senegal (namely, the delimitation of the exclusive economic zones) was, from the outset, ill-conceived. I take these points in order.

I. INADEQUATE SUBMISSIONS OF GUINEA-BISSAU

1. Is the 1989 Arbitral Award Inexistent?

2. The ground upon which Guinea-Bissau contended that the 1989 Award was "inexistent" consisted in the alleged fact that:

> "One of the two arbitrators [Mr. Barberis, the President of the Tribunal] making up the appearance of a majority in favour of the text of the 'award' has, by a declaration appended to it, expressed a view in contradiction with the one apparently *adopted by the vote*." (First submission of Guinea-Bissau in the written proceedings, emphasis added.)

In fact, Mr. Barberis stated in the first paragraph of his declaration that

> "I feel that the reply given by the Tribunal to *the first question* put by the Arbitration Agreement could have been more precise. I would have replied to that question as follows:
>
> 'The [1960 Franco-Portuguese] Agreement has the force of law in the relations between [Guinea-Bissau and Senegal] with respect to the territorial sea, the contiguous zone and the continental shelf, but does not have the force of law with respect to the waters of the exclusive economic zone or the fishery zone'" (emphasis added),

OPINION INDIVIDUELLE DE M. ODA, VICE-PRÉSIDENT

[Traduction]

1. Je souscris à la décision de la Cour de rejeter les conclusions présentées par la Guinée-Bissau, mais mes raisons de les rejeter sont beaucoup plus simples que celles qu'a exposées la Cour de façon assez détaillée. A mon avis, la Guinée-Bissau a tout simplement mal interprété, d'abord, la déclaration que le président du Tribunal arbitral a jointe à la sentence arbitrale de 1989, s'agissant de sa première conclusion, selon laquelle la sentence arbitrale doit être considérée comme frappée d'inexistence, et, deuxièmement, le compromis d'arbitrage lui-même, pour ce qui est de sa deuxième conclusion selon laquelle la sentence doit être déclarée frappée de nullité absolue. En outre, il me paraît important de souligner que toute la procédure qui a été suivie pour régler la question réellement controversée au milieu des années quatre-vingt entre la Guinée-Bissau et le Sénégal (à savoir la délimitation des zones économiques exclusives) a été d'emblée mal avisée. J'examinerai ces différents points l'un après l'autre.

I. CARENCES DES CONCLUSIONS DE LA GUINÉE-BISSAU

1. La sentence arbitrale de 1989 est-elle frappée d'inexistence?

2. Le motif invoqué par la Guinée-Bissau pour faire valoir que la sentence de 1989 est «frappée d'inexistence» résidait selon elle dans le fait que:

> «Des deux arbitres ayant constitué en apparence une majorité en faveur du texte de la «sentence», l'un [M. Barberis, président du Tribunal] a, par une déclaration annexe, exprimé une opinion en contradiction avec celle apparemment *votée.*» (Première conclusion présentée par la Guinée-Bissau au cours de la procédure écrite; les italiques sont de moi.)

En fait, au premier paragraphe de cette déclaration, M. Barberis a dit ce qui suit:

> «J'estime que la réponse donnée par le Tribunal à *la première question* posée par le compromis arbitral aurait pu être plus précise. En effet, j'aurais répondu à cette question de la façon suivante:
>
> > «L'accord [franco-portugais de 1960] fait droit dans les relations [entre la Guinée-Bissau et le Sénégal] en ce qui concerne la mer territoriale, la zone contiguë et le plateau continental, mais il ne fait pas droit quant aux eaux de la zone économique exclusive ou à la zone de pêche» (les italiques sont de moi),

while the 1989 Award itself stated that the 1960 Franco-Portuguese Agreement

> "has the force of law in the relations [between Guinea-Bissau and Senegal] with regard solely to the areas mentioned in that Agreement, namely the territorial sea, the contiguous zone and the continental shelf . . ." (1989 Award, para. 88).

The 1960 Agreement reads as follows:

> "As far as the outer limit of the territorial sea, the boundary shall consist of a straight line drawn at 240° from the intersection of the prolongation of the land frontier and the low-water mark, . . . As regards the contiguous zones and the continental shelf, the delimitation shall be constituted by the prolongation in a straight line, in the same direction, of the boundary of the territorial seas."

3. What Mr. Barberis had to say in the above-quoted part of his declaration served simply to affirm the conclusion reached by the Award and did not depart from it. As far as concerns the first question put to the Tribunal under Article 2, paragraph 1, of the 1985 Arbitration Agreement (that is, whether the 1960 Agreement had "force of law" in the relations between Guinea-Bissau and Senegal) — a question decided *by a majority vote* under paragraph 88 of the Award — there is no ground for contending, as the first submission of Guinea-Bissau states, that Mr. Barberis "expressed a view in contradiction with the one apparently *adopted by the vote*" (emphasis added). Hence, though the Award came into existence only thanks to the votes cast by Mr. Barberis and Mr. Gros, the contention cannot be sustained that it at once became inexistent because Mr. Barberis's declaration (allegedly) implied withdrawal of the agreement signified by his vote.

4. Mr. Barberis continued to state in the second and third paragraphs of his declaration:

> "This partially affirmative and partially negative reply is, in my view, the exact description of the legal position existing between the Parties . . . [T]his reply would have enabled the Tribunal to deal in its Award with the second question put by the Arbitration Agreement . . .
>
> . . . the Tribunal would have been competent to delimit the waters of the exclusive economic zone or the fishery zone between the two countries . . ."

Mr. Barberis thus seems to have construed the decision taken by the majority vote of the Tribunal — as stated in paragraph 88 of the Award — as potentially implying a "partially affirmative and partially negative reply" to the first question put to it, that is, the question whether the

tandis que la sentence de 1989 elle-même stipulait que l'accord franco-portugais de 1960

> « fait droit dans les relations [entre la Guinée-Bissau et le Sénégal] en ce qui concerne les seules zones mentionnées dans cet accord, à savoir la mer territoriale, la zone contiguë et le plateau continental... » (Sentence de 1989, par. 88.)

L'accord de 1960 se lit comme suit :

> « Jusqu'à la limite extérieure des mers territoriales, la frontière serait définie par une ligne droite, orientée à 240°, partant du point d'intersection du prolongement de la frontière terrestre et de la laisse de basse-mer... En ce qui concerne les zones contiguës et le plateau continental, la délimitation serait constituée par le prolongement rectiligne, dans la même direction, de la frontière des mers territoriales. »

3. Dans le passage précité de sa déclaration, M. Barberis a simplement voulu confirmer la conclusion énoncée dans la sentence et non s'en écarter. Pour ce qui est de la première question posée au Tribunal au paragraphe 1 de l'article 2 du compromis arbitral de 1985 (l'accord de 1960 « fait-il droit » dans les relations entre la Guinée-Bissau et le Sénégal ?) — question tranchée par un vote *à la majorité* comme indiqué au paragraphe 88 de la sentence — rien ne permet de soutenir, comme le fait la Guinée-Bissau dans sa première conclusion, que M. Barberis a « exprimé une opinion en contradiction avec celle apparemment *votée* » (les italiques sont de moi). Par conséquent, l'on ne peut pas soutenir que, alors même que la sentence ne doit son existence qu'aux voix exprimées par M. Barberis et M. Gros, elle a été immédiatement frappée d'inexistence parce que la déclaration de M. Barberis aurait prétendument sous-entendu un retrait de l'accord manifesté par son vote.

4. Aux deuxième et troisième paragraphes de sa déclaration, M. Barberis poursuit en disant :

> « Cette réponse partiellement affirmative et partiellement négative est, à mon avis, la description exacte de la situation juridique existant entre les Parties ... [C]ette réponse aurait habilité le Tribunal à traiter dans la sentence la deuxième question posée par le compromis arbitral...
>
> ... le Tribunal aurait été compétent pour délimiter les eaux de la zone économique exclusive ou la zone de pêche entre les deux pays... »

M. Barberis semble par conséquent avoir interprété la décision prise par le Tribunal à la suite d'un vote à la majorité — comme indiqué au paragraphe 88 de la sentence — comme pouvant sous-entendre une « réponse partiellement affirmative et partiellement négative » à la première ques-

1960 Agreement had "force of law", and this interpretation of his own led him to state that

> "this reply would have enabled the Tribunal to deal in its Award with the second question put by the Arbitration Agreement [that is, what is the course of the line delimiting the maritime territories . . .?]".

It may therefore be more convincingly argued that Mr. Barberis did hold a view different from what was stated in paragraph 87 of the Award which read:

> "Bearing in mind the above conclusions reached by the Tribunal and the actual wording of Article 2 of the Arbitration Agreement, in the opinion of the Tribunal it is *not called upon* to reply to the second question." (Emphasis added.)

This does not mean, however, that Mr. Barberis "expressed a view in contradiction with the one apparently *adopted by the vote*" (emphasis added), as the Tribunal's decision *adopted by the vote* was *only* related to the first question — Article 2, paragraph 1 — of the Arbitration Agreement (as expressed in paragraph 88 of the Award) but *not* the second question — Article 2, paragraph 2 — which would have required the Tribunal to decide the course of the delimitation line. In this respect, whatever Mr. Barberis stated in the second paragraph of his declaration cannot be considered as "a view in contradiction with the one apparently *adopted by the vote*" (emphasis added), as claimed by Guinea-Bissau.

5. The contention that the Arbitral Award is inexistent for the reason spelled out in the first submission of Guinea-Bissau is groundless since Mr. Barberis, in his declaration, simply corroborated the view *adopted by the vote* of the Tribunal. In fact, even if the declaration *had* contradicted the finding for which President Barberis had *voted* (which is not the case), it could at most have been regarded as an example of "second thoughts", as a *post facto* change of mind incapable of affecting the existence of the *collective* judicial act to which he had given not only his vote but also his signature.

2. *Is the 1989 Award Null and Void?*

6. To turn to the second submission of Guinea-Bissau in the written proceedings, that is, the subsidiary contention by which Guinea-Bissau claims that the 1989 Award is "absolutely null and void", Guinea-Bissau gives the following reasons, among others, that:

> "the Tribunal failed to reply to the second question raised by the Arbitration Agreement, whereas its reply to the first question implied a need for a reply to be given to the second"

tion qui lui avait été posée, c'est-à-dire à la question de savoir si l'accord de 1960 « fai[sai]t droit », et cette interprétation, qui est la sienne propre, l'a conduit à dire que :

> « cette réponse aurait habilité le Tribunal à traiter dans la sentence la deuxième question posée par le compromis arbitral [c'est-à-dire le tracé de la ligne délimitant les territoires maritimes...] ».

Il semble par conséquent que l'on puisse soutenir de façon plus convaincante que M. Barberis a effectivement été d'un avis différent de celui exprimé au paragraphe 87 de la sentence, qui se lit comme suit :

> « En tenant compte des conclusions ci-dessus auxquelles le Tribunal est parvenu et du libellé de l'article 2 du compromis arbitral, la deuxième question, de l'avis du Tribunal, *n'appelle pas une réponse de sa part.* » (Les italiques sont de moi.)

Cela ne signifie pas, cependant, que M. Barberis a « exprimé une opinion en contradiction avec celle apparemment *votée* » (les italiques sont de moi), étant donné que la décision *votée* par le Tribunal avait trait *exclusivement* à la première question — posée au paragraphe 1 de l'article 2 — du compromis arbitral (telle que cette décision est reflétée au paragraphe 88 de la sentence) mais *pas* à la seconde question — paragraphe 2 de l'article 2 — qui aurait amené le Tribunal à statuer sur le tracé de la ligne de délimitation. A ce propos, rien de ce que M. Barberis a dit au deuxième paragraphe de sa déclaration ne peut être considéré comme « une opinion en contradiction avec celle apparemment *votée* » (les italiques sont de moi), comme le soutient la Guinée-Bissau.

5. L'affirmation selon laquelle la sentence arbitrale est frappée d'inexistence pour le motif exposé dans la première conclusion de la Guinée-Bissau est dépourvue de fondement étant donné que M. Barberis, dans sa déclaration, a simplement corroboré l'avis *voté* par le Tribunal. En fait, même si la déclaration *avait* effectivement été en contradiction avec la conclusion pour laquelle le président Barberis avait *voté* (ce qui n'est pas le cas), sa déclaration aurait tout au plus pu être considérée comme exprimant un « tout bien réfléchi », comme un changement d'avis à posteriori ne pouvant affecter l'existence de l'acte judiciaire *collectif* qu'il avait non seulement appuyé de son vote mais encore revêtu de sa signature.

2. *La sentence de 1989 est-elle frappée de nullité ?*

6. Pour passer à la deuxième conclusion présentée par la Guinée-Bissau lors de la procédure écrite, c'est-à-dire le moyen subsidiaire par lequel la Guinée-Bissau soutient que la sentence de 1989 est « frappée de nullité absolue », la Guinée-Bissau invoque notamment les motifs suivants :

> « [le Tribunal a] négligé de répondre à la seconde question posée par le compromis d'arbitrage, alors que sa réponse à la première question ouvrait la nécessité d'une réponse à la seconde »

and

> "it did not comply with the provisions of the Arbitration Agreement by which the Tribunal was asked to decide on the delimitation of the maritime areas as a whole, to do so by a single line and to record that line on a map".

It is of course a fact that the Tribunal did not "reply to the second question raised by the Arbitration Agreement". Nor did it "decide on the delimitation of the maritime areas as a whole", or "[to] do so by a single line and [to] record that line on a map".

7. In its submissions to the Arbitration Tribunal, Guinea-Bissau requested it to consider that:

> "— The rules on the succession of States in respect of treaties . . . do not permit Senegal to invoke against Guinea-Bissau [the 1960 Franco-Portuguese Agreement] which in any case is absolutely null and void and non-existent;
>
> — The maritime delimitation between Senegal and Guinea-Bissau has thus never been determined;
>
> . . . .
>
> — For the delimitation of the continental shelves and exclusive economic zones . . . the maritime delimitation between the two States should be fixed between [azimuths 264° and 270°]",

while Senegal, in its submissions, requested the Arbitration Tribunal to declare and adjudge:

> "That by the [1960 Agreement] France and Portugal . . . have carried out the delimitation of a maritime frontier;
>
> That this Agreement, confirmed by the subsequent conduct of the contracting Parties as well as by the conduct of the sovereign States which succeeded to them, has the force of law in the relations between [Guinea-Bissau and Senegal]."

In the light of the submissions of Guinea-Bissau presented to the Arbitration Tribunal it is apparent that the Arbitration Agreement had not been drafted along the lines which Guinea-Bissau found to be in its interest.

8. The fundamental questions originally to be put to the Arbitration Tribunal had been converted into those concerning the effect of a treaty in a case of State succession, and the Tribunal was asked under Article 2, paragraph 1, simply whether that 1960 Agreement would "have the force of law in the relations between [Guinea-Bissau and Senegal]". The Arbitration Agreement simply required the Tribunal to define "the course of the line delimiting the maritime territories" *only* "in the event of a negative answer" to the question of whether the 1960 Agreement concluded between the two colonial States, Portugal and France, had force of law in the relations between Guinea-Bissau and Senegal. I add "only" in this

et

> «[le Tribunal ne s'est] pas conformé aux dispositions du compromis arbitral par lesquelles il était demandé au Tribunal de décider sur la délimitation de l'ensemble des espaces maritimes, de le faire par une ligne unique et d'en porter le tracé sur une carte».

Certes, il est vrai que le Tribunal n'a pas « répond[u] à la seconde question posée par le compromis d'arbitrage ». De même, il n'a pas « décid[é] sur la délimitation de l'ensemble des espaces maritimes » et il ne l'a pas fait « par une ligne unique » en en portant « le tracé sur une carte ».

7. Dans les conclusions qu'elle avait présentées au Tribunal arbitral, la Guinée-Bissau avait demandé à celui-ci de décider que:

> « — Les règles de la succession d'Etats en matière de traités ... ne permettent pas au Sénégal d'opposer à la Guinée-Bissau [l'accord franco-portugais de 1960], et qui est d'ailleurs frappé de nullité absolue et d'inexistence;
>
> — Ainsi la délimitation maritime n'a jamais été fixée entre le Sénégal et la Guinée-Bissau;
>
> . . . .
>
> — Pour la délimitation des plateaux continentaux et des zones économiques exclusives, ... c'est entre ces deux lignes [les azimuts 264° et 270°] que devra être fixée la délimitation maritime entre les deux Etats»,

tandis que le Sénégal, dans ses propres conclusions, avait prié le Tribunal arbitral de dire et juger:

> «Que par l'[accord de 1960] ... la France et le Portugal ont ... procédé à la délimitation d'une frontière en mer;
>
> Que cet accord, conforté par le comportement ultérieur des parties contractantes autant que par celui des Etats souverains qui leur ont succédé, fait droit dans les rapports entre [la Guinée-Bissau et le Sénégal].»

A la lumière des conclusions que la Guinée-Bissau a soumises au Tribunal arbitral, il apparaît que le compromis d'arbitrage n'avait pas été rédigé dans le sens dont la Guinée-Bissau pensait qu'il servirait le mieux ses intérêts.

8. Les questions fondamentales qui devaient initialement être posées au Tribunal arbitral avaient été converties en questions concernant l'effet d'un traité en cas de succession d'Etats et, au paragraphe 1 de l'article 2, le Tribunal a simplement été prié de statuer sur le point de savoir si l'accord de 1960 «fai[sai]t droit dans les relations entre [la Guinée-Bissau et le Sénégal]». Aux termes du compromis d'arbitrage, le Tribunal était simplement prié de définir «le tracé de la ligne délimitant les territoires maritimes» *uniquement* «en cas de réponse négative» à la question de savoir si l'accord de 1960 conclu entre les deux puissances coloniales, le Portugal et la France, faisait droit dans les relations entre la Guinée-

instance, because, though the word "only" does not appear in the Arbitration Agreement, there is no escaping its having been implied, as the Judgment has fully expounded (para. 50). The meaning of Article 2, paragraph 1, is so clear that there does not seem to be any call to refer for its interpretation to the Vienna Convention on the Law of Treaties.

9. The Arbitration Tribunal, *by its majority vote* (including the vote of Mr. Barberis), answered that question categorically and unequivocally in the affirmative. Here ended the plain task of the Tribunal, and this surely cannot be subject to any doubt whatsoever. The consequences that would ensue from the application of this Agreement were *not* within the Tribunal's mandate. Even so, the Arbitration Tribunal in 1989 qualified its own decision, and limited its scope, by stating that the "force of law" of the 1960 Franco-Portuguese Agreement would be limited "solely to . . . the territorial sea, the contiguous zone and the continental shelf" and Mr. Barberis, as I stated in paragraphs 3 and 4 above, affirmed and strengthened the Tribunal's position by stating that the "force of law" would not apply to "the waters of the exclusive economic zone or the fishery zone".

10. The Award could have been delivered without either of the phrases as quoted above, thus leaving room for different interpretations. Yet the Tribunal tried to avoid such ambiguity, and Mr. Barberis further spelled out the already unequivocal decision of the Tribunal in his declaration. Well may he have argued therein for an interpretation whereby the Tribunal's reply to the first question above could be seen as "partially negative". The very fact that, to support this argument, he had to rephrase the Tribunal's findings serves to underline the exclusively affirmative character of the actual reply. In any case, his personal interpretation could not have affected the Tribunal's categorical decision, taken by the majority vote (in which Mr. Barberis's vote was naturally included) on paragraph 88 of the Award, that the 1960 Agreement had "force of law" in the relations between Guinea-Bissau and Senegal. In sum, the second submission of Guinea-Bissau does not stand, because the Award fully responded in the affirmative by the majority vote to the question concerning the "force of law" of the 1960 Franco-Portuguese Agreement, and no reply to the second question was thus called for.

II. ERRORS IN REFERRAL OF THE DISPUTE TO THE DISPUTE-SETTLEMENT PROCEDURE

11. From the outset, owing to inadequate handling by the diplomatic authorities of Guinea-Bissau and Senegal of the real issues and problems between these two countries, the whole procedure for bringing their dis-

Bissau et le Sénégal. Si j'ajoute ici le mot « uniquement », c'est parce que, alors même qu'il n'apparaît pas dans le compromis d'arbitrage, il est indubitable qu'il a été sous-entendu, comme l'arrêt l'a analysé en détail (par. 50). La signification du paragraphe 1 de l'article 2 est si claire qu'il ne semble absolument pas nécessaire, pour l'interpréter, de se référer à la convention de Vienne sur le droit des traités.

9. Le Tribunal arbitral, *par un vote à la majorité* (y compris la voix de M. Barberis), a répondu à cette question, de façon catégorique et dépourvue d'ambiguïté, par l'affirmative. Là s'achevait la tâche clairement confiée au Tribunal, et cela ne peut en rien faire l'ombre d'un doute. Les conséquences qui découleraient de l'application de cet accord *n'*entraient *pas* dans le mandat du Tribunal. Et cependant, le Tribunal arbitral en 1989 a nuancé sa propre décision et en a limité la portée en déclarant que l'accord franco-portugais de 1960 « fai[sai]t droit » « en ce qui concern[ait] les seules zones mentionnées dans cet accord, à savoir la mer territoriale, la zone contiguë et le plateau continental » et M. Barberis, comme je l'ai dit aux paragraphes 3 et 4 ci-dessus, a confirmé et renforcé la position du Tribunal en déclarant que l'accord « ne fai[sai]t pas droit quant aux eaux de la zone économique exclusive ou à la zone de pêche ».

10. La sentence aurait pu être prononcée sans l'un ou l'autre des deux membres de phrase cités ci-dessus, laissant ainsi la possibilité d'interprétations différentes. Or, le Tribunal a tenté d'éviter une telle ambiguïté, et M. Barberis a précisé encore plus la décision déjà sans équivoque du Tribunal dans sa déclaration. Il aurait très bien pu soutenir dans sa déclaration une interprétation selon laquelle la réponse donnée par le Tribunal à la première des questions susmentionnées pouvait être considérée comme « partiellement négative ». Le fait même que, pour étayer cet argument, M. Barberis a dû remanier les termes employés par le Tribunal confirme le caractère exclusivement affirmatif de la réponse effectivement donnée à cette question. En tout état de cause, son interprétation personnelle n'a pas pu affecter la décision catégorique du Tribunal, prise à la majorité des voix (parmi lesquelles celle de M. Barberis était naturellement comprise) au paragraphe 88 de la sentence, à savoir que l'accord de 1960 « fai[sai]t droit » dans les relations entre la Guinée-Bissau et le Sénégal. En résumé, la deuxième conclusion de la Guinée-Bissau ne tient pas parce que, dans la sentence, le Tribunal a répondu pleinement par l'affirmative, par un vote à la majorité, à la question de savoir si l'accord franco-portugais de 1960 « fai[sai]t droit » et que, par conséquent, aucune réponse à la deuxième question ne s'imposait.

II. ERREURS COMMISES LORSQUE LE DIFFÉREND A ÉTÉ SOUMIS À LA PROCÉDURE DE RÈGLEMENT

11. Du fait que les autorités diplomatiques de la Guinée-Bissau et du Sénégal n'ont pas pris en main comme il convient les réelles divergences de vues et les réels problèmes entre ces deux pays, toute la procédure que

pute to the Arbitration Tribunal in 1985 and then the present case before this Court in 1989 was ill-starred.

1. Background to the Dispute

12. The delimitation of the exclusive economic zones, in view of the fishery interests of both States, has been at issue since the late 1970s. Senegal and Guinea-Bissau had gained independence from France and Portugal in 1960 and 1973 respectively. Senegal, by its *Act of 2 July 1976, establishing a sea fishery code, as amended by the Law of 8 February 1985,* claimed "the right to fish . . . in an exclusive economic zone of 200 nautical miles in breadth, . . . waters under Senegalese jurisdiction". On 19 May 1978 Guinea-Bissau enacted *Law on the extension of the territorial sea and exclusive economic zone,* under which the exclusive economic zone was claimed as extending "within the national maritime borders to 200 miles" where Guinea-Bissau claimed "exclusive rights over exploration and exploitation of the living and natural resources of the sea". The same claim was restated by Guinea-Bissau in the *Act of 17 May 1985 concerning the delimitation of the continental shelf.* The line of the delimitation of the exclusive economic zone with the neighbouring States was not specified in the domestic legislation of either State. Yet it was clear that the claims of Senegal and Guinea-Bissau to exclusive economic zones were overlapping in some areas, and various incidents involving conflicts between the fishery interests of the two States occurred. Diplomatic negotiations were continued between the two States.

2. The Inappropriate Drafting of the 1985 Arbitration Agreement

13. In March 1985 Guinea-Bissau and Senegal, having been unable to settle their dispute by negotiation, decided to refer to arbitration "the dispute relating to the determination of their maritime boundary" (Preamble to the Arbitration Agreement). It is obvious that both Parties, when referring to "the maritime boundary", meant to include in that definition the delimitation of the exclusive economic zones. Yet the matter of the determination of maritime boundaries was not even referred to in the primary and basic question which was actually asked of the Arbitration Tribunal. The Tribunal was in fact simply requested to decide, in accordance with the norms of international law, whether the 1960 Agreement between the colonial powers (Portugal and France) which related to the delimitation of the territorial seas, the contiguous zones and the continental shelf had force of law in the relations between the two States which had gained independence. Only in the event of a negative answer to that question was the

ceux-ci ont suivie pour porter leur différend devant le Tribunal arbitral en 1985 puis la présente affaire devant la Cour en 1989 a d'emblée été vouée à l'échec.

1. *Historique du différend*

12. Eu égard aux intérêts des deux Etats en matière de pêcheries, la délimitation des zones économiques exclusives a posé un problème depuis la fin des années soixante-dix. Le Sénégal et la Guinée-Bissau avaient obtenu leur indépendance de la France et du Portugal en 1960 et en 1973 respectivement. Le Sénégal, par une *loi du 2 juillet 1976 portant code de la pêche en mer, telle qu'elle a été modifiée par la loi du 8 février 1985*, a revendiqué « le droit de pêche ... dans une zone économique exclusive qui s'étend sur une largeur de 200 milles marins », c'est-à-dire « dans les eaux relevant de la juridiction du Sénégal ». Le 19 mai 1978, la Guinée-Bissau a promulgué une *loi relative à l'étendue de la mer territoriale et de la zone économique exclusive*, dans laquelle cette dernière était déclarée s'étendre « à l'intérieur des frontières maritimes internationales jusqu'à 200 milles marins », zone dans laquelle la Guinée-Bissau revendiquait « des droits exclusifs d'exploration et d'exploitation des ressources biologiques et des ressources naturelles de la mer ». La même revendication a été réaffirmée par la Guinée-Bissau dans la *loi du 17 mai 1985 relative à la délimitation du plateau continental*. La ligne de délimitation de la zone économique exclusive à l'égard des Etats voisins n'était pas spécifiée dans la législation interne de l'un ou l'autre Etat. Cependant, il était clair que les prétentions du Sénégal et celles de la Guinée-Bissau sur leurs zones économiques exclusives se chevauchaient dans certains secteurs et plusieurs incidents motivés par des conflits entre les deux Etats en matière de pêcheries se sont produits. Les deux Etats ont poursuivi leurs négociations diplomatiques.

2. *Les carences du libellé du compromis d'arbitrage de 1985*

13. En mars 1985, la Guinée-Bissau et le Sénégal, n'ayant pu résoudre leur différend par voie de négociation, ont décidé de soumettre à l'arbitrage « le différend relatif à la détermination de leur frontière maritime » (préambule du compromis d'arbitrage). Il est évident que les deux Parties, en parlant de leur « frontière maritime », entendaient inclure dans cette définition la délimitation des zones économiques exclusives. Or, la question de la délimitation des frontières maritimes n'était même pas évoquée dans la question primordiale et fondamentale qui a en fait été posée au Tribunal arbitral : le Tribunal a simplement été prié de statuer, conformément aux normes du droit international, si l'accord de 1960 conclu entre les puissances coloniales (le Portugal et la France) au sujet de la délimitation des mers territoriales, des zones contiguës et du plateau continental faisait droit dans les relations entre les deux Etats qui avaient depuis lors accédé à l'indépendance. Ce n'était qu'en cas de réponse négative à cette

Tribunal requested to decide what would be the course of the line delimiting the maritime territories appertaining to both States respectively. In view of the real issue in dispute between the two States, it is obvious that the Agreement was drafted in an inappropriate manner. The Parties should have asked a question to cover the situation of a positive answer to the first question being given by the Arbitration Tribunal.

14. In the diplomatic negotiations between Guinea-Bissau and Senegal, their representatives were certainly aware of the 1960 Agreement which, if it possessed force of law, had defined the delimitation of the continental shelf as the 240° azimuth line. They seem also to have proceeded on the premise that there ought to be a single line of delimitation for both the exclusive economic zone and the continental shelf, a line which might be called the maritime boundary. They must further have taken for granted, it would appear, a second premise : namely that a line of delimitation for the exclusive economic zones (a new concept of international law) ought to coincide with any existing line of delimitation for the continental shelf (a concept which had been in existence for several decades). The combination of these two premises apparently induced Guinea-Bissau to believe that, if it wished to secure a line of delimitation for the exclusive economic zones with a bearing between 270° and 264°, it had first to make sure that the 240° line stipulated in 1960 was precluded through negation of the 1960 Franco-Portuguese Agreement. Senegal, on the other hand, satisfied that the 240° line would also apply to a line of delimitation for the exclusive economic zones, seems to have concluded that it had simply to depend on the force of law of that Agreement. It was thus natural and inevitable for both Parties to highlight the question of the validity of the 1960 Agreement. But the actual terms of the Arbitration Agreement only make sense on the assumption that, whether a continental shelf line already existed or not, the above premises underlay — expressly or implicitly — the two Governments' negotiating positions intended to achieve the drawing of a delimitation line for the exclusive economic zones.

15. In any event, while having clearly rendered its Award in response to the actual terms of the Arbitration Agreement, the Arbitration Tribunal in 1989 did not settle the real issue between the two States. That is to say, it did not define the course of the line delimiting the exclusive economic zones appertaining to Guinea-Bissau and Senegal respectively. The failure of the Award to refer to this line should certainly not be held against the Arbitration Tribunal. It would rather seem, in brief, that the deplorable aspects of the present case are traceable to the fact that the representatives of the two countries who were responsible for drafting the Arbitration Agreement embarked upon their task without sufficient grasp of what they had taken for granted as premises in the light of some essential concepts of the law of the sea, particularly those concerning the interrelation between the exclusive economic zone and the continental

question que le Tribunal était prié de déterminer quel était le tracé de la ligne délimitant les territoires maritimes qui relevaient respectivement des deux Etats. Eu égard à la question réellement en litige entre les deux Etats, il est évident que le compromis n'a pas été rédigé de la façon appropriée. Les Parties auraient dû poser une question qui envisagerait le cas où le Tribunal arbitral aurait répondu par l'affirmative à la première question.

14. Lors des négociations diplomatiques entre la Guinée-Bissau et le Sénégal, leurs représentants étaient certainement conscients du fait que l'accord de 1960, s'il faisait droit, avait défini la délimitation du plateau continental comme étant la ligne d'azimut 240°. Ils semblent aussi s'être basés sur la prémisse qu'il devrait y avoir une seule ligne de délimitation aussi bien pour la zone économique exclusive que pour le plateau continental, ligne qui pourrait être appelée la frontière maritime. Il semblerait par ailleurs qu'ils aient dû tenir pour acquise une seconde prémisse, à savoir que la ligne de délimitation des zones économiques exclusives (concept nouveau en droit international) devrait coïncider avec toute ligne de délimitation préexistante du plateau continental (concept qui existait depuis plusieurs décennies). La conjugaison de ces deux prémisses a apparemment conduit la Guinée-Bissau à penser que, si elle souhaitait obtenir pour la délimitation des zones économiques exclusives une ligne orientée entre 270° et 264°, elle devait tout d'abord obtenir que la ligne d'azimut 240° stipulée en 1960 soit écartée pour le motif que l'accord franco-portugais de 1960 n'était pas valable. Le Sénégal, en revanche, convaincu que la ligne orientée à 240° s'appliquerait aussi à la ligne de délimitation des zones économiques exclusives, semble être parvenu à la conclusion qu'il lui suffisait de faire fond sur le fait que ledit accord faisait droit. Aussi n'était-il que naturel et inévitable que les deux Parties mettent en relief la question de la validité de l'accord de 1960. Mais le libellé effectivement donné au compromis d'arbitrage n'a de sens que si l'on suppose — qu'il ait ou non existé déjà une ligne de délimitation du plateau continental — que les prémisses susmentionnées sous-tendaient, expressément ou tacitement, la position que les deux gouvernements avaient adoptée lors des négociations tendant à obtenir le tracé d'une ligne de délimitation des zones économiques exclusives.

15. Quoi qu'il en soit, tout en ayant manifestement rendu sa sentence conformément aux termes effectivement utilisés dans le compromis, le Tribunal arbitral, en 1989, n'a pas réglé le problème réel qui opposait les deux Etats. En d'autres termes, il n'a pas défini le tracé de la ligne délimitant les zones économiques exclusives relevant respectivement de la Guinée-Bissau et du Sénégal. Le Tribunal ne peut certainement pas être blâmé pour le fait que la sentence ne mentionne pas cette ligne. Il semblerait plutôt, en bref, que les aspects regrettables de la présente affaire sont imputables au fait que les représentants des deux pays qui avaient été chargés de rédiger le compromis ont entrepris de le faire sans bien saisir les incidences des prémisses qu'ils avaient tenues pour acquises à la lumière de certains concepts essentiels du droit de la mer, particulièrement ceux touchant l'interdépendance entre la zone économique exclu-

shelf. They put to the Arbitration Tribunal a question which drifted away from the genuine issues, which concerned the law of the sea, in order to focus upon a narrow preliminary issue of treaty interpretation.

3. *Insufficient Object of the Present Proceedings before the Court*

16. Guinea-Bissau may have assumed too hastily that it was, as counsel for Guinea-Bissau defined it, the "losing party" at the Arbitration Tribunal. In fact Guinea-Bissau was certainly not the "losing party", even though it did not, as it clearly wished to do, secure a line between the bearings of 270° and 264° for the delimitation of the exclusive economic zones; Senegal (certainly not to be considered the "winning party") was not, for its part, assured that the 240° line, as defined in the 1960 Agreement for the continental shelf, would apply to the exclusive economic zone. Having viewed the Arbitral Award as an outright defeat, the competent authorities of Guinea-Bissau were further misguided in bringing a case in 1989 before this Court asking for a ruling on the validity of the Award. Guinea-Bissau found it appropriate to put to the Court a question as to whether the 1989 Award (which in any event did not settle the dispute) was existent or not, valid or null and void. But whatever judgment might have been given by the Court in the present case (in fact the submissions of Guinea-Bissau are rejected in the present Judgment) — in other words, even if the Court had declared the Arbitral Award non-existent or null and void —, the positions of Guinea-Bissau and Senegal, or their interests and rights relating to the boundary of the exclusive economic zones, could not have been affected.

17. It seems to me therefore that, from the time of its presentation to the present Court, this litigation lacked any meaningful object. The past six-year period since the break-up of diplomatic negotiations for drawing a line of delimitation of the exclusive economic zones, the object of which had been primarily to settle the fishery disputes between them, seems to have simply been wasted. The issues in dispute between these two neighbouring States left unsettled were sent back to the starting point and remain in 1991 the same as they were in 1985. One should not, however, overlook the fact that one positive element was clarified in the Award, that is, that there now exists between Guinea-Bissau and Senegal a loxodromic line of 240° azimuth for the delimitation of the continental shelf and that this point is upheld in the present Judgment. The present issue between the two States, unlike the issue in 1985, should be concerned with the drawing of a line of delimitation for the exclusive economic zones in a situation where a line of 240° for the continental shelf has been confirmed as already in existence.

sive et le plateau continental. Ils ont posé au Tribunal arbitral une question qui s'écartait des réels problèmes, qui avaient trait au droit de la mer, pour mettre l'accent sur une question préliminaire étroite liée à l'interprétation des traités.

3. *L'insuffisance de l'objet de la présente instance devant la Cour*

16. La Guinée-Bissau doit avoir supposé trop hâtivement qu'elle était, pour reprendre les termes de son conseil, la « partie perdante » devant le Tribunal arbitral. En fait, la Guinée-Bissau n'était certainement pas la « partie perdante », alors même qu'elle n'avait pas obtenu, comme elle le souhaitait manifestement, que les zones économiques exclusives soient délimitées par une ligne comprise entre les azimuts 270° et 264° ; le Sénégal (que l'on ne peut certainement pas considérer comme la « partie gagnante ») n'était pas assuré, pour sa part, que la ligne orientée à 240°, telle qu'elle était définie dans l'accord de 1960 dans le contexte du plateau continental, s'appliquerait à la zone économique exclusive. Ayant vu dans la sentence arbitrale une défaite totale, les autorités compétentes de la Guinée-Bissau ont été mal inspirées aussi d'introduire devant la Cour, en 1989, une instance demandant à celle-ci de statuer sur la validité de la sentence. La Guinée-Bissau a jugé bon de poser à la Cour la question de savoir si la sentence de 1989 (laquelle, en tout état de cause, n'avait pas réglé le différend) était ou non frappée d'inexistence ou était valable ou entachée de nullité. Toutefois, quel que soit l'arrêt auquel la Cour aurait pu parvenir en l'occurrence (en fait, le présent arrêt rejette les conclusions de la Guinée-Bissau) — autrement dit, même si la Cour avait déclaré la sentence arbitrale inexistante ou entachée de nullité — les positions de la Guinée-Bissau et du Sénégal, ou leurs intérêts et leurs droits pour ce qui est de la frontière des zones économiques exclusives, n'auraient pas pu s'en trouver affectées.

17. Il me semble par conséquent que, dès qu'il a été soumis à la Cour, le présent litige n'a guère eu d'objet réel. Les six années qui se sont écoulées depuis la rupture des relations diplomatiques tendant à tracer une ligne de délimitation des zones économiques exclusives, dont le but avait été simplement de régler les différends en matière de pêche entre les deux Etats, semblent avoir été purement et simplement gaspillées. Les questions litigieuses en suspens entre ces deux Etats voisins ont été renvoyées à leur point de départ et demeurent, en 1991, identiques à ce qu'elles étaient en 1985. Toutefois, il ne faut pas méconnaître le fait que la sentence a élucidé un élément positif, à savoir qu'il existe aujourd'hui entre la Guinée-Bissau et le Sénégal une ligne loxodromique d'azimut 240° délimitant le plateau continental, et que ce point est confirmé dans le présent arrêt. Telle qu'elle se pose actuellement entre les deux Etats, à la différence de la situation qui existait en 1985, la question doit tendre à tracer une ligne de délimitation des zones économiques exclusives alors qu'il a été confirmé qu'il existe déjà une ligne de délimitation du plateau continental, c'est-à-dire une ligne d'azimut 240°.

III. Conclusions

1. Dualism of the Exclusive Economic Zone and the Continental Shelf

18. The new concept of the exclusive economic zone gives to the coastal State

> "sovereign rights for the purpose of exploring and exploiting . . . the natural resources, whether living or non-living . . . of the sea-bed and its subsoil" (1982 United Nations Convention on the Law of the Sea, Art. 56, para. 1),

while under the already established existing concept of the continental shelf, the coastal State exercises "sovereign rights for the purpose of exploring [the continental shelf] and exploiting its natural resources" (1958 Convention on the Continental Shelf, Art. 2, para. 1; 1982 United Nations Convention, Art. 77, para. 1). Bearing in mind that the subject (that is, the exploring of the sea-bed and its subsoil and the exploitation of its natural resources, covered by the concept of the continental shelf) is now completely superseded by or even absorbed in the new concept of the exclusive economic zone, a uniform maritime area for the exclusive economic zone and the continental shelf may certainly be desirable, and it is to be recommended that a single line of delimitation between the neighbouring States be institutionalized in order to avoid conflicts in the exercise of jurisdiction by different coastal States over the same maritime area, depending on whether this is the exclusive economic zone or the continental shelf. However, the question concerning the uniform régime for the exclusive economic zone and the continental shelf certainly did not receive an affirmative answer in the 1982 United Nations Convention on the Law of the Sea, as reflected in the provisions of that Convention allowing the co-existence of the parallel régimes of the exclusive economic zone and the continental shelf. It should be noted that the Arbitration Tribunal constituted in 1985 by Guinea-Bissau and Senegal preferred, as implied in the Arbitral Award and directly expressed in Mr. Barberis's declaration, not to depart from the basic concept entertaining parallel régimes for the exclusive economic zone and the continental shelf.

19. Much controversy still surrounds the question *de lege ferenda* whether the delimitation of exclusive economic zones ought to be identical to that of the continental shelf or, more fundamentally, whether the new concept of the exclusive economic zone ought to take the place of or to absorb the traditional concept of the continental shelf (except for the offshore distance, it being impermissible for an exclusive economic zone to extend beyond 200 miles from the shore, whereas a State's continental shelf, depending on the interpretation of the famous "exploitability" criterion in the 1958 Convention on the Continental Shelf, may extend fur-

III. CONCLUSIONS

1. Le dualisme de la zone économique exclusive et du plateau continental

18. Le nouveau concept de zone économique exclusive donne à l'Etat côtier

> « des droits souverains aux fins d'exploration et d'exploitation ... des ressources naturelles, biologiques ou non biologiques ... des fonds marins et de leur sous-sol » (convention des Nations Unies de 1982 sur le droit de la mer, art. 56, par. 1),

alors que, selon le régime existant et établi applicable au plateau continental, l'Etat côtier exerce « des droits souverains sur le plateau continental aux fins de son exploration et de l'exploitation de ses ressources naturelles » (convention de 1958 sur le plateau continental, art. 2, par. 1 ; convention des Nations Unies de 1982, art. 77, par. 1). Si l'on considère que ce sujet (c'est-à-dire l'exploration des fonds marins et de leur sous-sol et l'exploitation de leurs ressources naturelles, qu'englobe le concept de plateau continental) est aujourd'hui totalement remplacé par le nouveau concept de zone économique exclusive ou même absorbé par ce dernier, il peut certainement être souhaitable d'avoir une frontière maritime uniforme pour la zone économique exclusive et le plateau continental, et il y a lieu de recommander l'institutionnalisation d'une ligne de délimitation unique entre les Etats voisins pour éviter des conflits dans l'exercice par différents Etats côtiers de leur juridiction sur la zone maritime, qu'il s'agisse de la zone économique exclusive ou du plateau continental. Toutefois, la question de savoir si la zone économique exclusive et le plateau continental doivent être soumis à un régime uniforme n'a certainement pas reçu une réponse affirmative dans la convention des Nations Unies de 1982 sur le droit de la mer, comme en témoignent les dispositions de ladite convention qui autorisent la coexistence des régimes parallèles de la zone économique exclusive et du plateau continental. Il convient de noter que le Tribunal arbitral constitué en 1985 par la Guinée-Bissau et le Sénégal a préféré, comme cela découle implicitement de la sentence et comme l'a dit expressément M. Barberis dans sa déclaration, ne pas s'écarter du concept de base qui prévoyait la possibilité de soumettre à des régimes parallèles la zone économique exclusive et le plateau continental.

19. De vives controverses continuent d'entourer la question *de lege ferenda* de savoir si la délimitation des zones économiques exclusives devrait être identique à celle du plateau continental ou, élément plus fondamental, si le nouveau concept de zone économique exclusive devrait se substituer au concept traditionnel de plateau continental ou l'absorber (sauf pour ce qui est de son extension vers la haute mer, dans la mesure où une zone économique exclusive ne peut pas s'étendre à une distance supérieure à 200 milles marins de la côte, tandis que le plateau continental d'un Etat, selon l'interprétation donnée au fameux critère d'« exploitabi-

ther), or whether the two régimes of the exclusive economic zone and the continental shelf would remain existing in parallel between neighbouring States, but with different lines of delimitation. If the two régimes are to be merged in a case where the régime of the continental shelf has already effectively existed, a further question will still have to be answered, that is, whether or not an existing line of delimitation for the continental shelf should dictate the line for the new régime of the exclusive economic zone, or a new line of delimitation to be agreed upon for exclusive economic zones should automatically entail reconsideration of the existing line for the continental shelf. A uniform régime covering both the exclusive economic zone and the continental shelf will remain to be settled.

20. Without taking any position on the question whether the United Nations Convention on the Law of the Sea is already to be regarded as existing international law or not, I must point out that that Convention separately provides practically identical provisions concerning the delimitation of the areas concerned between the neighbouring States for both the exclusive economic zone and the continental shelf in parallel, stating that

> "[t]he delimitation of [the exclusive economic zone] [the continental shelf] between States with . . . adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution" (United Nations Convention on the Law of the Sea, Arts. 74 and 83).

One is led to conclude that the delimitation of the line of the exclusive economic zones or of the continental shelf between neighbouring States, or both, is, in the first place, a matter for negotiation between the States concerned. What would be an equitable solution may well be different for the respective delimitations of the exclusive economic zones and of the continental shelf.

2. *Alternatives Now Faced by Guinea-Bissau and Senegal*

21. Guinea-Bissau and Senegal are certainly free to follow, as a basis for their negotiations, the thesis (which was entertained in the 1982 United Nations Convention and followed by the 1989 Arbitral Award) that a separate régime for the exclusive economic zone can exist in parallel with that of the continental shelf, and that a line of delimitation for their exclusive economic zones may be drawn in the light of various factors leading to an equitable solution for that purpose, independently of the existing line of 240° azimuth for the continental shelf.

22. Yet they are also free jointly to prefer another thesis, namely that

lité» figurant dans la convention de 1958 sur le plateau continental, peut s'étendre sur une distance plus grande), ou encore si les deux régimes applicables dans la zone économique exclusive et sur le plateau continental continueraient d'exister parallèlement entre des Etats voisins, mais sur la base de lignes de délimitation différentes. Si les deux régimes doivent être fusionnés alors que le régime applicable au plateau continental a déjà existé dans la pratique, il restera à répondre à une autre question encore, qui est de savoir si la ligne de délimitation existante du plateau continental devrait ou non dicter la ligne à l'intérieur de laquelle s'appliquera le nouveau régime de zone économique exclusive, ou si une nouvelle ligne de délimitation des zones économiques exclusives à convenir devrait automatiquement conduire à revoir la ligne existante applicable au plateau continental. Un régime uniforme englobant à la fois la zone économique exclusive et le plateau continental demeurera à établir.

20. Sans prendre aucunement position sur le point de savoir si la convention des Nations Unies sur le droit de la mer doit déjà être considérée ou non comme faisant partie du droit international existant, je dois faire observer que cette convention contient en deux endroits des dispositions virtuellement identiques touchant la délimitation des zones en question entre Etats voisins, parallèlement pour la zone économique exclusive et le plateau continental, qui stipulent ce qui suit:

> «[l]a délimitation [de la zone économique exclusive] [du plateau continental] entre Etats dont les côtes sont adjacentes ou se font face est effectuée par voie d'accord conformément au droit international tel qu'il est visé à l'article 38 du Statut de la Cour internationale de Justice, afin d'aboutir à une solution équitable» (convention des Nations Unies sur le droit de la mer, art. 74 et 83).

L'on est ainsi amené à conclure que le tracé de la ligne de délimitation des zones économiques exclusives ou du plateau continental entre Etats voisins, ou des deux, est une question qui relève au premier chef de négociations entre les Etats intéressés. Ce qui constituerait une solution équitable peut fort bien être différent dans le cas de la délimitation des zones économiques exclusives et du plateau continental.

2. *Les options qui s'offrent maintenant à la Guinée-Bissau et au Sénégal*

21. La Guinée-Bissau et le Sénégal sont certainement libres de suivre, dans leurs négociations, la thèse (envisagée dans la convention des Nations Unies de 1982 et suivie par la sentence arbitrale de 1989) selon laquelle il peut exister parallèlement des régimes séparés pour la zone économique exclusive et pour le plateau continental et selon laquelle une ligne de délimitation de leurs zones économiques exclusives peut être tracée à la lumière des différents facteurs de nature à conduire à une solution équitable, indépendamment de la ligne existante d'azimut 240° applicable au plateau continental.

22. Les Parties sont cependant libres aussi d'opter ensemble pour une

there should be a single line for the exclusive economic zones and the continental shelf. In that event, it should first be understood that, if a line to delimit the exclusive economic zones is to be identical to the existing line for the continental shelf, there will remain little or no room for negotiation. In the framework of this thesis, negotiation on a new line for the exclusive economic zones would be meaningful only on the understanding that the existing continental shelf line may be subject to alteration or adjustment, depending on the new line agreed for the exclusive economic zones. Guinea-Bissau and Senegal should be aware that they now face a situation which is quite different from those in the *North Sea Continental Shelf* cases (1969) (in which "principles and rules of international law . . . applicable to the delimitation as between [Germany and the Netherlands; Germany and Denmark] of the areas of the continental shelf . . ." were sought) and the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case (1982) (in which the delimitation of "the area of the continental shelf" between these two States was sought), or the situation in the case of *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (1984) (in which Canada and the United States gave a Chamber of the Court *carte blanche* to provide them with an equitable "course of the single maritime boundary" where there did not exist any line of delimitation for the continental shelf).

23. That being understood, and without prejudice to the interpretation of the new Application to the present Court of 12 March 1991, I hope that Guinea-Bissau and Senegal eventually engage in a definitive attempt to draw a line of delimitation of their respective exclusive economic zones with a clear picture of every element to be taken into account, and bearing in mind that the line for the continental shelf already exists. To repeat, it falls within the matters to be negotiated by the Parties whether parallel régimes for the exclusive economic zones and the continental shelf will prevail, thus producing two co-existent lines or, in the case of drawing a single line, what influence upon it the existing line for the continental shelf should retain, or whether the latter should even be adjusted or renegotiated.

(Signed) Shigeru ODA.

autre thèse, à savoir que les zones économiques exclusives et le plateau continental devraient être délimitées par une ligne unique. En pareil cas, il faudra tout d'abord bien comprendre que, si l'on veut qu'une ligne délimitant les zones économiques exclusives soit identique à la ligne existante délimitant le plateau continental, il n'y aura pas grand-chose, ou rien, à négocier. Sur la base de cette thèse, la négociation d'une nouvelle ligne de délimitation des zones économiques exclusives n'aurait de sens que s'il est entendu que la ligne existante délimitant le plateau continental peut faire l'objet de modifications ou d'ajustements, selon la nouvelle ligne de délimitation des zones économiques exclusives qui pourra être convenue. La Guinée-Bissau et le Sénégal doivent bien saisir le fait qu'ils se trouvent aujourd'hui dans une situation très différente de celle des affaires du *Plateau continental de la mer du Nord* (1969) (dans lesquelles la Cour était invitée à déterminer « les principes et les règles du droit international applicables à la délimitation entre [l'Allemagne et les Pays-Bas; l'Allemagne et le Danemark] des zones du plateau continental... ») et du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)* (1982) (dans laquelle la Cour était priée de délimiter la « zone du plateau continental » entre ces deux Etats), ou encore de la situation dans l'affaire de la *Délimitation de la frontière maritime dans la région du golfe du Maine* (1984) (dans laquelle le Canada et les Etats-Unis ont donné à une chambre de la Cour carte blanche pour leur indiquer « le tracé de la frontière maritime unique » alors qu'il n'existait aucune ligne de délimitation du plateau continental).

23. Cela étant entendu, et sans préjudice de l'interprétation de la nouvelle requête soumise à la Cour le 12 mars 1991, j'espère que la Guinée-Bissau et le Sénégal feront une tentative finale de tracer une ligne de délimitation de leurs zones économiques exclusives respectives en pleine connaissance de tous les éléments à prendre en considération et en ayant à l'esprit que la ligne de délimitation du plateau continental existe déjà. Pour répéter, il appartiendra aux négociations entre les Parties de déterminer si des régimes parallèles applicables aux zones économiques exclusives et au plateau continental devront prévaloir, aboutissant ainsi au tracé de deux lignes coexistantes, ou, s'il est tracé une seule ligne, quelle influence sur celle-ci devra conserver la ligne existante de délimitation du plateau continental, ou encore si cette dernière devrait même être ajustée ou renégociée.

(Signé) Shigeru ODA.

SEPARATE OPINION OF JUDGE LACHS

I would like to stress at the outset that, despite the Court's dismissal of the Applicant's submissions, there can be no suggestion that Guinea-Bissau committed an abuse of procedure in challenging the 1989 Award before this Court. It is the inherent right of any party to proceedings, let alone a government with a nation's permanent interests to defend, to seek to have the result declared a nullity if it is convinced that the decision taken is basically flawed. This is so even in respect of decisions characterized as final, inasmuch as a decision so vitiated can be viewed as stillborn, a mere semblance of a decision or, to use the term employed by the present Applicant, as inexistent. In any case Guinea-Bissau stressed, and Senegal concurred, that the present proceedings had not been instituted by way of appeal.

The Court, in order to avoid any suggestion of acting like a court of appeal, has limited itself to establishing whether there was any basis for Guinea-Bissau's submissions, by taking the Applicant's specific criticisms quite separately, one by one.

Yet an application asserting that a judgment or award is "inexistent" or "absolutely null and void" implies a claim that all the efforts of the court or tribunal in question to administer justice and resolve a dispute have come to nothing. Such a claim can only be directed at some alleged flaw or flaws of a vital character, since it is no mere challenge to a decision, but amounts to a repudiation of the entire process traversed by the tribunal in its deliberations. As such, it calls for exceptional scrutiny.

In this regard, the Court's exercise of its competence to deal with the specific submissions did not, in my view, prevent it from proceeding to closer analysis, without in any way encroaching upon the substance of the issues which it had been for the Arbitration Tribunal alone to decide. A complaint of nullity does not in itself debar the court dealing with it from lifting the veil on matters of competence and substance, provided they are germane to the issue of validity, since the handling of such matters, as distinct from procedural issues of a purely formal nature, may in fact lie at the heart of the complaint. The Court was not precluded from making comments in keeping with its position as a guardian of the standards of judicial decision-making, and thus performing a signal service to the sister institution of arbitration.

Among the elements subjected to analysis is a document which the Court found could not be ignored, namely the declaration of the President

OPINION INDIVIDUELLE DE M. LACHS

[Traduction]

Je tiens à souligner tout d'abord que, malgré le rejet par la Cour des conclusions de la requérante, rien ne permet de dire que la Guinée-Bissau s'est rendue coupable d'un abus de procédure en contestant la sentence de 1989 devant la Cour. En effet, toute partie à une instance, et plus encore un gouvernement qui se doit de défendre les intérêts permanents d'une nation, a le droit intrinsèque de chercher à en faire annuler le résultat si elle estime que la décision prise est fondamentalemnent viciée. Cela est vrai même des décisions qualifiées de définitives, car on peut voir dans une décision viciée un mort-né, un simulacre de décision ou encore une décision inexistante, pour reprendre l'expression utilisée par la requérante en cette instance. En tout état de cause, la Guinée-Bissau a insisté que la présente instance ne constituait pas un appel, et le Sénégal en est convenu avec elle.

La Cour, afin de ne pas donner l'impression qu'elle s'érigeait en cour d'appel, s'est bornée à déterminer s'il y avait un fondement quelconque aux conclusions de la Guinée-Bissau, en examinant l'une après l'autre chacune des critiques spécifiques de la requérante.

Or, une requête affirmant qu'un arrêt ou une sentence est « inexistante » ou « frappée de nullité absolue » suppose que tous les efforts déployés par la cour ou le tribunal en question pour rendre la justice et résoudre un différend ont été vains. Une telle affirmation ne peut que viser un ou plusieurs prétendus vices ayant un caractère essentiel, car elle ne se contente pas de contester une décision mais constitue bel et bien un rejet de l'ensemble du processus qu'a suivi le tribunal dans ses délibérations. En tant que telle, elle appelle un examen des plus approfondis.

A cet égard, l'exercice par la Cour de sa compétence à traiter des conclusions telles que formulées par les Parties ne l'empêchait pas, à mon avis, de procéder à une analyse plus serrée, sans pour autant empiéter sur le fond des questions que seul le Tribunal arbitral pouvait trancher. Une demande en annulation, en soi, n'interdit pas à la cour qui en est saisie de se pencher sur des questions de compétence et de fond, à condition qu'elles se rapportent à la question de la validité, car le traitement réservé à ces questions, par opposition à des questions de procédure de pure forme, peut constituer le cœur même de la revendication. Il n'était nullement interdit à la Cour de faire des commentaires convenant à sa qualité de garante des normes devant présider à l'élaboration des décisions de justice; elle aurait ainsi pu rendre un insigne service à l'institution sœur qu'est l'arbitrage.

Au nombre des éléments à analyser figure un document que la Cour a estimé ne pouvoir ignorer, à savoir la déclaration du président du Tribu-

of the Arbitration Tribunal. However correct it may be to conclude that this declaration did not undo the vote by which President Barberis enabled a majority to be created for the operative clause, it certainly expresses an approach to the competence of the Tribunal which is at variance with that enshrined in the Award itself. This approach is couched in cautious terms of what the Tribunal "could" rather than "should" have done, but the sole motive behind the negative corollary attached to the Award's operative provision in the President's reformulation was clearly to convey his opinion that the Tribunal's competence had been broader than the Award allowed. This is particularly clear from the second half of the declaration. One can only note that the Award does not disclose whether any vote was taken on the important issues covered in paragraph 87 of the Award.

Now the Court could enter into the scope of the Tribunal's competence to the extent required to determine whether the Tribunal's own interpretation of it, as disclosed by the Award, was not manifestly untenable. For that purpose it had to rely on the wording of the Special Agreement and of paragraph 87 of the Award, there lying the focus of the matter. But, analytically speaking, there is no doubt that, far from being manifestly untenable, what the Tribunal said contains nothing to sustain an assertion of invalidity, even supposing that failure to exhaust jurisdiction would be sufficient to justify a finding in that sense.

The declaration of President Barberis therefore casts doubt on whether paragraph 87 really is "the opinion of the Tribunal". Had that paragraph *in fact*, rather than just formally, belonged exclusively to the reasoning of the Award, this would not have been a crucial matter: as instanced by the very opinions appended to the present Judgment, there is no necessity for the member of a tribunal to agree with every part of the reasoning before he can vote in favour of the decision. But paragraph 87 undeniably contains not merely reasoning but two decisions, including one of major importance. Hence it is an understatement for the Court merely to have pointed out that the structure of the Award was "open to criticism".

By appending his declaration, Mr. Barberis ensured that he would appear to the reader in two distinct personalities: the arbitrator who voted for the decision as it stood, and the arbitrator who would have preferred, not an entirely different decision, but the inclusion of a further decision or decisions on matters concerning which the Award had remained silent. Mr. Barberis was consequently faced with a serious dilemma, and one can sincerely sympathize with him in that respect; but as a distinguished jurist he must have realized the difficulties in store for him, and the risk of his being, as a judge, in no position to justify himself if criticized. As was wisely said some eighty years ago:

nal arbitral. Aussi juste que soit la conclusion que cette déclaration n'a pas annulé le vote par lequel le président Barberis a permis au dispositif de faire l'objet d'une majorité, cette déclaration témoigne de toute évidence d'une approche de la compétence du Tribunal qui diffère de celle que reflète la sentence elle-même. Cette approche est traduite en termes prudents : il s'agit de ce que le Tribunal « aurait pu » et non « aurait dû » faire, mais l'unique raison d'être de ce corollaire négatif ajouté au dispositif de la sentence par la nouvelle formulation du président était manifestement de faire savoir qu'à son avis la compétence du Tribunal était en fait plus large que la sentence elle-même ne le laissait entendre. Cela ressort tout particulièrement de la seconde moitié de la déclaration. On ne peut que noter que la sentence ne précise pas s'il y avait eu un vote sur les questions importantes visées au paragraphe 87 de la sentence.

Or, la Cour pouvait examiner l'étendue de la compétence du Tribunal dans la mesure nécessaire pour déterminer si l'interprétation faite par le Tribunal lui-même de sa compétence, telle qu'elle ressort de la sentence, n'était pas manifestement intenable. A cette fin, elle a dû se fonder sur le libellé du compromis spécial et du paragraphe 87 de la sentence, où réside le fond du problème. Mais, du point de vue de l'analyse, il n'y a pas lieu de douter que, loin d'être manifestement intenables, les propos du Tribunal ne renferment aucun élément permettant de conclure à la nullité, même à supposer que le fait de ne pas avoir épuisé sa compétence suffise à justifier une telle conclusion.

La déclaration du président Barberis conduit donc à douter que le paragraphe 87 constitue véritablement « l'avis du Tribunal ». Si dans la *réalité*, et non simplement à titre purement formel, ce paragraphe s'était inscrit uniquement dans l'argumentation de la sentence, cela n'aurait guère eu d'importance : comme en témoignent les opinions jointes au présent arrêt, un membre d'un tribunal n'a pas à être d'accord avec chaque moment du raisonnement avant de pouvoir voter en faveur d'une décision. Mais il se trouve que le paragraphe 87 non seulement s'inscrit dans le raisonnement, mais encore, sans le moindre doute, comporte deux décisions, dont l'une est d'importance majeure. Ainsi, la Cour penche du côté de la litote en se contentant de constater que la sentence peut « donner prise à la critique ».

En joignant sa déclaration, M. Barberis a fait en sorte de projeter une double image dans l'esprit du lecteur et à apparaître à la fois comme l'arbitre qui avait voté pour la décision telle qu'elle avait été prise et comme celui qui eût préféré non une décision totalement différente, mais l'inclusion d'une ou de plusieurs décisions concernant des questions sur lesquelles la sentence était demeurée muette. M. Barberis se trouvait donc face à un grave dilemme auquel l'on peut sincèrement être sensible ; mais, éminent juriste, il devait bien savoir les difficultés que l'avenir lui réservait et connaître les risques d'être, en tant que juge, en position de ne pouvoir se défendre face à des critiques. Comme l'a dit un sage il y a quelque quatre-vingts ans :

> "The mouth of the judge is sealed; he is not permitted to deny or refute the allegations made against him, whatever may be their falsity or whatever his reputation as a just and impartial judge . . . !" (*State of Delaware* v. *Glascow*, US District Court, 1912.)

(How incomparably more serious was the situation of a judge once blamed — by some alleged authorities — not for what he had done, or even for what he could not have done, but simply for the policy of the then government of his country! Faced with such an attack, a judge may be helpless.)

Nevertheless, despite the unusual relationship between the Award and the presidential declaration, the fact remains that the latter is simply an appendix added after the Award had come into being with the casting of votes. It cannot be regarded as controlling or modifying the sense of the Award. It is reasonable to assume that judicial declarations or opinions may shed some light on aspects of the cases considered. They may sometimes help in the interpretation of the decisions to which they are attached. However, while the appended text may prompt a doubt and even a challenge, it cannot undo the decision itself.

The arguments of Guinea-Bissau disclose, however, a more general dissatisfaction with the treatment given by the Tribunal to the dispute between the Parties, and it is indeed difficult to avoid the impression that the result was not commensurate with the time spent in arriving at it. The expectations of Guinea-Bissau were clearly aroused by the presentation of the Tribunal as one concerned to deal with "the determination of the maritime boundary", a comprehensive expression encompassing, it might be thought, the whole scope of the dispute which had been the object of negotiations between the two States for a considerable number of years. Those negotiations having failed, they proceeded to draw up the Arbitration Agreement. But it was in the drafting of this treaty that diplomacy appears to have nodded, by conferring upon the tribunal to be formed a competence which, in certain conditions, might not be found adequate to the object and purpose of settling the whole dispute. Hence I agree with the present Judgment in finding that the germ of the problem lay less in the Award itself than in the Arbitration Agreement under which it was given.

However, the way the reply was framed is open to serious objections. The Court finds that the reasoning of the Award was "brief, and could doubtless have been developed further". I would add, that while brevity is a virtue, excessive brevity may suggest lack of adequate consideration, hence the imperative need to explain the decision: it is not a flood of words which is called for but convincing reasoning and adequate explanations. A clear exposition of the grounds of the decision constitutes an indispensable part of any judgment or award. As has been pointed out, once submitted to a court or to arbitration a dispute becomes a "persua-

> « La bouche du juge est cousue; il ne saurait nier ou réfuter la moindre chose dont on l'accuse, aussi injustifiée soit-elle ou quelle que soit sa réputation de juge juste et impartial... ! » (*State of Delaware* v. *Glascow*, US District Court, 1912.)

(Incomparablement plus grave encore fut la situation d'un juge autrefois blâmé — par certaines prétendues autorités — non pas pour avoir fait ce qu'il avait fait, ni même pour n'avoir pas fait ce qu'il ne pouvait faire, mais simplement pour la politique du gouvernement en place dans son pays à ce moment-là ! Face à une telle attaque, le juge peut être impuissant.)

Néanmoins, malgré la relation inhabituelle entre la sentence et la déclaration du président, le fait est que cette déclaration est simplement un appendice rajouté après que le scrutin a donné naissance à la sentence. On ne peut admettre que la déclaration prime sur la sentence ou en modifie le sens. Il est raisonnable de supposer que les déclarations ou opinions d'un juge peuvent éclairer certains aspects des affaires auxquelles elles se rapportent. Elles peuvent quelquefois aider à interpréter les décisions auxquelles elles sont jointes. Cependant, si un texte joint peut provoquer un doute, voire lancer un défi, il ne saurait annuler la décision elle-même.

L'argumentation de la Guinée-Bissau témoigne toutefois d'un mécontentement plus général face à la façon dont le Tribunal a traité le différend entre les Parties et, de fait, il est difficile de se défaire de l'impression que le résultat n'a pas été proportionnel au temps qui y avait été consacré. Les espoirs de la Guinée-Bissau ont manifestement été avivés par l'intitulé du Tribunal, qui devait s'occuper de « la détermination de la frontière maritime », expression globale dont il y avait lieu de croire qu'elle engloberait l'ensemble du différend qui avait fait l'objet de négociations entre les deux Etats durant bon nombre d'années. Après avoir constaté l'échec de ces négociations, les deux Etats ont procédé à l'élaboration du compromis d'arbitrage. Mais c'est lors de la rédaction de ce traité que la diplomatie semble avoir failli en conférant au futur tribunal une compétence qui, dans certaines conditions, pourrait être jugée inadéquate au regard de l'objet et de la finalité du règlement de l'ensemble du différend. Je conviens donc avec le présent arrêt que l'origine du problème résidait moins dans la sentence elle-même que dans le compromis d'arbitrage dont elle est issue.

Cela dit, le libellé même de la réponse soulève de graves objections. La Cour considère que la motivation de la sentence « est brève, et aurait pu être plus développée ». J'ajouterais que si la brièveté est une vertu, son excès peut refléter l'insuffisance de l'analyse, d'où la nécessité impérieuse d'expliquer la décision : on ne s'attend pas à une logorrhée, mais à une argumentation convaincante et à des explications suffisantes. Un clair exposé des motifs constitue un élément indispensable de tout arrêt ou de toute sentence. Comme il a été dit, une fois qu'une cour ou un tribunal arbitral en a été saisi, un différend devient un « différend éloquent » et

sive conflict", hence requires a *"persuasive decision"*. Not necessarily one which will persuade everybody, but one sufficiently plausible.

Moreover, there is one other point to which I wish to address myself, namely the Applicant's claim that Article 9, paragraph 2, of the Arbitration Agreement imposed upon the Tribunal an obligation in any circumstances to "include the drawing of a boundary line on a map".

The Tribunal was not, in my opinion, relieved of this obligation by its decision not to reply to the second question put to it. The language of the Agreement is clear and imperative: the implementation of Article 9, paragraph 1, is not conditioned nor is it irrational. If the possibility of limiting the reply to one question only was envisaged, it is difficult to conclude that this released the Tribunal from the obligation enshrined in the Article. Admittedly, from a common-sense point of view, it is arguable that, as "a loxodromic line", the boundary was clear and required no graphic illustration. I can therefore agree with the Judgment that the absence of a chart did not constitute "such an irregularity as would render the Award invalid". Yet it was not proper to belittle the obligation as the Tribunal did. Elementary courtesy required that the matter be dealt with in a different way.

Arbitration as a secure means of settling with finality difficult disputes has from time immemorial enjoyed great prestige in the setting of municipal law. Long before the existence of any permanent international judiciary, arbitration between States had likewise become one of the most highly respected, valued and effective means for the peaceful settlement of international disputes. A heavy responsibility rests upon arbitral tribunals to contribute towards the maintenance of this status and assist the institution to develop more effectively in a world where the changing relationship of States and the ever-increasing areas of contact between their interests are bound to create new problems. Thus one cannot but regret that the Tribunal did not succeed in producing a decision with the cogency to command respect.

(Signed) Manfred LACHS.

appelle par conséquent une *«décision éloquente»*. Décision qui ne convaincra pas nécessairement tout le monde, mais qui reste suffisamment plausible.

Il est un autre point sur lequel je voudrais m'arrêter, à savoir l'allégation de la requérante selon laquelle l'article 9, paragraphe 2, du compromis d'arbitrage imposait au Tribunal l'obligation, en toutes circonstances, de «comprendre le tracé de la ligne frontière sur une carte».

A mon avis, le Tribunal n'était pas libéré de cette obligation par sa décision de ne pas répondre à la seconde question qui lui était posée. Le libellé du compromis est clair et impératif: l'application de l'article 9, paragraphe 1, n'est ni conditionnelle ni irrationnelle. Si l'on avait envisagé la possibilité de limiter la réponse à une seule question, il est difficile de conclure que le Tribunal était de ce fait dégagé de l'obligation consignée dans l'article. Certes, du point de vue du simple bon sens, on peut soutenir qu'étant une «ligne loxodromique» la frontière était claire et n'appelait aucune illustration graphique. Je puis donc convenir avec l'arrêt que l'absence de carte ne constituait pas une «irrégularité susceptible d'entacher la sentence arbitrale d'invalidité». Reste qu'il était inconvenant de méconnaître à ce point l'obligation faite au Tribunal. La courtoisie la plus élémentaire exigeait que la question fût traitée différemment.

En droit interne, l'institution de l'arbitrage jouit depuis toujours d'un grand prestige comme moyen de régler définitivement des différends difficiles. Bien avant la création d'une instance judiciaire internationale permanente, l'arbitrage entre Etats était également devenu l'un des moyens les plus respectés, les plus appréciés et les plus efficaces de régler pacifiquement les différends internationaux. Les tribunaux arbitraux ont une lourde responsabilité, en ce sens qu'ils doivent contribuer à préserver l'estime dans laquelle cette institution est tenue et l'aider à évoluer dans le sens d'une plus grande efficacité dans un monde où les relations mouvantes entre Etats et la multiplication des heurts entre leurs intérêts ne peuvent que créer de nouveaux problèmes. Ainsi, on ne peut que regretter que le Tribunal n'ait pas réussi à parvenir à une décision assez solide pour forcer le respect.

(Signé) Manfred LACHS.

SEPARATE OPINION OF JUDGE NI

I agree with the decision of the Court that the Application of Guinea-Bissau should be rejected. I also agree generally with the line of reasoning contained in the Judgment. I feel, however, that certain aspects of the Judgment might call for further elaboration.

The present case involves the following two questions, which will be dealt with successively. They are: (1) whether the Award of 31 July 1989 should be considered inexistent because of the declaration made by the President of the Arbitration Tribunal, Mr. Barberis; and (2) subsidiarily whether the Award should be considered a nullity because the Tribunal failed to answer the second question in Article 2 of the Arbitration Agreement and also failed to append the map provided for in Article 9 of that Agreement, without giving reasons therefor.

1. ALLEGED INEXISTENCE OF THE AWARD

It is to be noted that, of the three members of the Arbitration Tribunal, Mr. Barberis and Mr. Gros voted for the Award, while Mr. Bedjaoui voted against it. If Mr. Barberis's declaration is to be viewed as a dissent from the Award, as alleged by Guinea-Bissau, the Award should, Guinea-Bissau contends, be considered as inexistent because it would no longer be supported by a majority. The declaration of Mr. Barberis has been quoted *in extenso* in paragraph 19 of the Judgment and will not be reproduced here.

On reading Mr. Barberis's declaration one notes that it contains a number of verbal forms in conditional tenses, such as "could have", "would have", "might have", etc. To a large extent it merely sets forth a series of doubts, reservations, suppositions or suggested variations without expressing any clear and decisive opposition to or contradiction with any part of the operative clause of the Award that would enable one to view the declaration as manifesting dissent.

On the contrary, the declaration affirms in substance, as does the Award, that the Agreement concluded by Exchange of Letters in 1960 has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal. The declaration likewise affirms, as does the Award, that the Agreement is binding on the Parties with respect to the territorial sea, the contiguous zone and the continental shelf. It also indicates, as does the Award, that the Agreement does not bind the Parties with respect to the waters of the exclusive economic zone or the fishery zone.

OPINION INDIVIDUELLE DE M. NI

[Traduction]

Je suis d'accord avec la décision de la Cour selon laquelle la requête de la Guinée-Bissau doit être rejetée. De manière générale, je suis également d'accord avec l'argumentation figurant dans l'arrêt. Cependant, il est à mon sens certains éléments qui mériteraient un examen plus poussé.

Dans la présente affaire, deux questions de fond, que je traiterai séparément, sont posées : 1) la sentence du 31 juillet 1989 devrait-elle être frappée d'inexistence à cause de la déclaration du président du Tribunal arbitral, M. Barberis ; et 2) subsidiairement, la sentence prononcée est-elle entachée de nullité du fait que le Tribunal a négligé de répondre à la seconde question figurant à l'article 2 du compromis d'arbitrage et de joindre à sa sentence le tracé de la ligne frontière sur une carte, tel que prévu à l'article 9 du compromis, sans donner de raisons.

1. ALLÉGATION D'INEXISTENCE DE LA SENTENCE

Il convient de noter que, des trois membres du Tribunal arbitral, M. Barberis et M. Gros ont voté pour, alors que M. Bedjaoui a voté contre. Si la déclaration de M. Barberis doit être perçue, comme le prétend la Guinée-Bissau, comme une opinion contraire à la sentence, alors la sentence doit, de l'avis de la Partie requérante, être considérée comme inexistante puisque, selon la Guinée-Bissau, elle ne serait plus fondée sur une majorité. La déclaration de M. Barberis a été citée *in extenso* au paragraphe 19 de l'arrêt et ne sera donc pas reprise ici.

Une lecture de la déclaration de M. Barberis révèle qu'elle comporte un certain nombre d'expressions, rédigées au conditionnel, et notamment « aurait », « aurait pu », « aurait pu ou non », etc. Elle est rédigée dans une large mesure sous la forme d'énoncés de doute, de réserves, de suppositions ou de variantes proposées sans soulever aucune opposition claire et décisive ou contradiction à l'égard d'aucune partie du dispositif de la sentence susceptible de faire apparaître la déclaration comme une expression de dissentiment.

La déclaration affirme toutefois en substance, comme le fait la sentence, que l'accord conclu par échange de lettres en 1960 fait droit dans les relations entre la République de Guinée-Bissau et la République du Sénégal. On y établit aussi, de même que dans la sentence, que l'accord fait droit entre les Parties à l'égard de la zone territoriale, de la zone contiguë et du plateau continental. Comme la sentence, la déclaration indique encore que l'accord ne fait pas droit pour ce qui est des eaux de la zone économique exclusive ou la zone de pêche.

The declaration, however, diverges from the operative part of the Award concerning the phrase "with regard *solely* to the areas mentioned in that Agreement, namely the territorial sea, the contiguous zone and the continental shelf" (emphasis added) in paragraph 88 of the Award. This implies that the exclusive economic zone is left out. According to the view expressed by Mr. Barberis in his declaration, to this phrase of the operative part of the Award there should have been added "but does not have the force of law with respect to the waters of the exclusive economic zone or the fishery zone". In the view of Mr. Barberis, this "partially affirmative and partially negative reply" would have enabled the Tribunal to deal with the second question and thus settle "the whole of the dispute" concerning maritime boundaries between the two States.

But at this point there arises the question whether the reply given to Article 2, paragraph 1, of the *compromis*, either explicitly or impliedly, can be characterized as a "partially affirmative and partially negative reply". The question put in Article 2, paragraph 1, of the *compromis* is about the validity of the 1960 Agreement, which could only have referred to the territorial sea, the contiguous zone and the continental shelf, the only maritime spaces that existed at the time of the conclusion of the Agreement. Therefore no question of exclusive economic zone or fishery zone could have arisen. When the Tribunal answered the first question in Article 2, paragraph 1, of the *compromis*, it could only give an answer in respect of the territorial sea, the contiguous zone and the continental shelf, to the exclusion of any other space. By answering that question in the affirmative, the Tribunal performed its task fully. The answer cannot be presented as a "partially affirmative and partially negative reply".

In paragraph 88 of the Award the word "solely" is explanatory rather than exclusionary. It does not mean that when the validity of the 1960 Agreement was raised before the Tribunal for decision, the Tribunal *admitted* that the Agreement had the force of law with respect to the territorial sea, the contiguous zone and the continental shelf, but *denied* its having force of law with respect to the exclusive economic zone or the fishery zone. Nor does it mean that the Tribunal gave an *affirmative* answer with respect to the first three spaces, but a *negative* answer with respect to the fourth, i.e., the exclusive economic zone or the fishery zone. In making the Award, the Tribunal simply could not have taken this space into account, inasmuch as the concept of exclusive economic zone did not exist at the time of conclusion of the 1960 Agreement. The validity or lack of validity of the Agreement with respect to the exclusive economic zone or fishery zone constituted no part of the object of the arbitration. Since the question of the exclusive economic zone or fishery zone was not before the Tribunal, it stands to reason that it could not have been passed upon by the Tribunal.

Such being the case, the Tribunal's answer to the first question in Article 2, paragraph 1, of the *compromis* is a reply in full, not a partial one.

La déclaration diffère du dispositif de la sentence en ceci que le membre de phrase « en ce qui concerne les *seules* zones mentionnées dans cet accord, à savoir la mer territoriale, la zone contiguë et le plateau continental » (les italiques sont de moi), au paragraphe 88 de la sentence, implique que la zone économique exclusive est exclue. Selon la déclaration de M. Barberis, celui-ci souhaiterait ajouter au dispositif ceci : « mais ne fait pas droit pour les eaux de la zone économique exclusive ou la zone de pêche ». Selon M. Barberis, cette « réponse partiellement affirmative et partiellement négative » aurait habilité le Tribunal à trancher la seconde question et à régler ainsi le différend « d'une manière complète », pour ce qui est des frontières maritimes entre les deux Etats.

Mais ici apparaît la question de savoir si la réponse donnée au paragraphe 1 de l'article 2 du compromis, que ce soit explicitement ou implicitement, peut être caractérisée comme étant « partiellement affirmative et partiellement négative ». La question posée au paragraphe 1 de l'article 2 du compromis porte sur la validité de l'accord de 1960, qui ne pouvait faire référence qu'à la mer territoriale, à la zone contiguë et au plateau continental, seuls espaces maritimes existant à l'époque de la conclusion de l'accord. Il ne pouvait donc être question de zone économique exclusive ou de zone de pêche. Lorsque le Tribunal a répondu à la question posée au paragraphe 1 de l'article 2 du compromis, il ne pouvait se prononcer qu'au sujet de la mer territoriale, de la zone contiguë et du plateau continental, à l'exclusion de tout autre espace. En répondant à cette question de manière affirmative, le Tribunal a accompli sa tâche entièrement. La réponse ne saurait être qualifiée de « réponse partiellement affirmative et partiellement négative ».

L'expression « les seules », employée au paragraphe 88 de la sentence, est explicative plutôt qu'exclusive. L'expression ne signifie pas que lorsque le point de savoir si l'accord de 1960 faisait droit a été soumis au Tribunal, pour décision, le Tribunal ait *admis* que l'accord avait force de loi pour la mer territoriale, la zone contiguë et le plateau continental, *niant* qu'il faisait droit pour ce qui est de la zone économique exclusive ou de la zone de pêche. Elle ne signifie pas davantage que le Tribunal ait donné une réponse *affirmative* pour ce qui est des trois premières zones mais donné une réponse *négative* pour ce qui est de la quatrième, c'est-à-dire la zone économique exclusive ou la zone de pêche. Il n'était absolument pas question que, prononçant la sentence, le Tribunal tienne compte de la quatrième ; en effet, le concept de zone économique exclusive n'existait pas encore lors de la conclusion de l'accord de 1960. La validité ou la non-validité pour ce qui est de la zone économique exclusive ou la zone de pêche n'entrait aucunement dans le cadre de l'arbitrage. Le Tribunal n'était pas saisi de la question de la zone économique exclusive ou la zone de pêche et cette question ne saurait donc naturellement pas avoir fait l'objet d'une décision du Tribunal.

Dans ces conditions, la réponse du Tribunal à la première question du paragraphe 1 de l'article 2 du compromis est une réponse complète et non

Since it is an affirmative reply to the first question, the Tribunal was not called upon to answer the second question in Article 2, paragraph 2, of the *compromis*; the reason is the express condition: "In the event of a negative answer to the first question." It was in fact impossible for Mr. Barberis to set off on a quest for the solution of a question which did not arise, for the Tribunal was not confronted with the question of the validity of the 1960 Agreement with respect to the exclusive economic zone or the fishery zone.

Mr. Barberis suggested that the Tribunal would have been competent to delimit the waters of the exclusive economic zone or the fishery zone so as to settle the whole dispute. But the Tribunal could not go beyond its mandate, which only concerned the territorial sea, the contiguous zone and the continental shelf. In fact, Mr. Barberis went no further. He merely suggested a more comprehensive solution, as is clear from his use of the phrase "would have been". But his suggestion stopped there. His declaration cannot therefore be taken to record his dissent, thereby overriding or invalidating his vote. The vote is the most reliable indication as to whether or not he concurred with the Award.

The declaration is not part of the Award. The practice whereby judges attach separate opinions, dissenting opinions or declarations is well established since the days of the Permanent Court of International Justice. The practice is at present embodied in Article 95, paragraph 2, of the Rules of Court, which provides that:

> "Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not; a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration . . ."

From the wording of this provision, it is clear that since individual opinions or declarations are *attached* to the judgment, they cannot be a part of it. Since they are individual opinions, whether or not they concur with the judgment (or, in this case, with the Award), they cannot be considered to represent the opinion of the body (whether a court or tribunal) as a whole. They can only represent the views of the individual authors. They are thus attached to the judgment or award, but do not form an integral part thereof. They can explain, interpret, vary, criticize or even differ in certain respects from the judgment or award. But to criticize or to propose variations does not necessarily import dissent. It is the operative part, and in particular the voting, that counts. Unless the operative part is in turn divided into parts and voted upon separately, it is the whole of the operative part that is voted upon.

In fact, this is the only sensible way to look at a judgment or award which is rendered, not by one judge or arbitrator alone, but by a panel. If

une réponse partielle. Comme il s'agissait d'une réponse affirmative à la première question, le Tribunal n'était pas appelé à répondre à la seconde question posée au paragraphe 2 de l'article 2 du compromis, qui était tributaire d'une condition expresse: « En cas de réponse négative à la première question. » M. Barberis ne pouvait en fait se mettre en quête de la solution d'un problème qui n'existait pas, puisque le Tribunal n'était pas confronté à la question de savoir si l'accord de 1960 faisait droit pour ce qui est de la zone économique exclusive ou la zone de pêche.

M. Barberis a donné à penser que le Tribunal aurait eu compétence pour délimiter les eaux de la zone économique exclusive ou la zone de pêche de manière à régler l'ensemble du différend. Mais le Tribunal ne pouvait pas aller au-delà de son mandat, qui ne concernait que la mer territoriale, la zone contiguë et le plateau continental. En fait M. Barberis en est resté là. Il a simplement suggéré une solution plus complète, comme en témoigne son choix de mots: « aurait pu être ». Sa suggestion s'arrête cependant en ce point précis. On ne saurait donc considérer sa déclaration comme un énoncé destiné à consigner sa divergence de vues, jusqu'à annuler ou invalider son vote. En fait, le vote est l'indicateur le plus fiable pour déterminer si M. Barberis s'associe ou non à la sentence.

La déclaration ne fait pas partie de la sentence. La pratique observée par les juges de joindre une opinion individuelle, une opinion dissidente ou une déclaration n'est pas nouvelle; elle date de l'époque de la Cour permanente de Justice internationale. Cette pratique est désormais intégrée à l'article 95, paragraphe 2, du Règlement de la Cour, qui prévoit que:

> « Tout juge peut, s'il le désire, joindre à l'arrêt l'exposé de son opinion individuelle ou dissidente; un juge qui désire faire constater son accord ou son dissentiment sans en donner les motifs peut le faire sous la forme d'une déclaration. »

Ce libellé montre clairement, puisqu'il y est dit qu'une opinion individuelle ou une déclaration est *jointe* à l'arrêt, qu'elle ne saurait en faire partie intégrante. Etant donné que l'on se trouve en présence d'opinions individuelles, qu'il s'agisse d'accords ou de dissentiments à l'égard de l'arrêt (ou, en l'occurrence, de la sentence), on ne saurait les considérer comme représentant l'opinion du collège (qu'il s'agisse d'une cour ou d'un tribunal) pris dans son ensemble. Elles ne peuvent que représenter les vues des rédacteurs pris individuellement. Et elles ne sont donc que jointes à l'arrêt ou à la sentence, sans en faire partie intégrante. Elles peuvent expliciter, interpréter, constituer des variantes, critiquer, voire constituer un dissentiment à certains égards, à l'encontre du jugement ou de la sentence. Mais critiquer ou proposer des variantes ne signifie pas nécessairement qu'il y a dissentiment. C'est le dispositif et, plus particulièrement, le vote qui compte. A moins que le dispositif ne soit subdivisé et ne fasse l'objet de votes distincts, c'est sur l'ensemble du dispositif que l'on vote.

En fait, ceci constitue la seule façon rationnelle de concevoir un arrêt ou une sentence rendu non pas par un seul juge ou arbitre mais par un

the parties were at liberty to assess an individual opinion or declaration by their own viewpoints and thus disregard the voting, the legal order would be thrown into great confusion. Nor can one consider that since the Court has, in the present case, jurisdiction with respect to the Award it is free to disregard the vote by giving its own evaluation of what a declaration by an individual judge or arbitrator amounts to, unless there is clear and unmistakable proof that the facts are such that the declaration can be regarded as a statement of dissent and the voting was flawed by mistake or compulsion. But such is not the case here.

Guinea-Bissau has criticized Senegal for "taking refuge behind legal formalism". But judges or arbitrators do not vote as a mere matter of formality. They do so in order to express their precise position. They are fully aware of the substantive implications of their vote. The vote is not just a formal gesture. The vote indicates their final decision. If the declaration, as in this case, raises an uncertainty as to whether a judge or arbitrator concurs with or dissents from a judgment or an award, it is the vote that constitutes the authentic expression of his attitude.

For these reasons, Guinea-Bissau's assertion that there was no majority in support of the Arbitral Award of 31 July 1989 and that the Award should be adjudged and declared to be inexistent cannot be accepted.

2. ALLEGED NULLITY OF THE AWARD

Guinea-Bissau asks the Court to adjudge and declare, subsidiarily, that the so-called decision is absolutely null and void, as the Tribunal failed to reply to the second question put in the Arbitration Agreement, as it did not decide on the delimitation of the maritime areas, as a whole, by a single line and did not record that delimitation on a map, and as it has not given the reasons on which the Award is based.

Arbitration has been useful in the peaceful settlement of disputes between States. But there have also been abuses which can result in nullities. What is crucial is to have a list of the causes of nullity and also to make provision for the kind of international organ which will be entrusted with deciding on alleged causes of nullity.

It was in 1929 that the Government of Finland made a proposal to examine the question and recommended that the power to pronounce nullities should be vested in the Permanent Court of International Justice. A committee of specialists was appointed by the Council of the League of Nations to study the proposal. In the same year, the Institute of International Law decided to include on the agenda the possible constitution of a body to hear appeals in *cassation* against decisions of international arbi-

collège. Si les parties avaient toute latitude pour considérer une opinion individuelle ou une déclaration en fonction de leur propre perspective et pour faire ainsi abstraction du vote, quelle confusion de l'ordre juridique cela créerait-il ! On ne peut pas davantage concéder que la Cour, compétente pour la sentence (comme c'est le cas en la présente affaire), puisse être considérée comme libre de faire abstraction du vote en interprétant à son gré ce que représente la déclaration de l'un des juges ou arbitres, à moins qu'il n'existe une preuve manifeste et incontestable de ce que les faits sont tels que la déclaration constitue l'expression d'un dissentiment et que le vote a été vicié par une erreur ou des contraintes. Mais ce n'est pas le cas en l'espèce.

La Guinée-Bissau a reproché au Sénégal de « s'être retranché derrière le formalisme juridique ». Mais les juges ou les arbitres ne votent pas seulement pour accomplir une formalité. C'est leur façon d'exprimer avec précision leur position. Ils ont pleinement conscience des incidences matérielles de leur vote, lequel n'est pas un simple geste formel. Le vote est l'indice de leur décision définitive. Si la déclaration, comme en la présente affaire, donne lieu à une incertitude sur le point de savoir si un juge ou un arbitre approuve un arrêt ou une sentence ou s'il en diverge, c'est le vote qui montre quelle est sa véritable attitude.

Pour ces raisons, on ne saurait admettre l'affirmation de la Guinée-Bissau selon laquelle il n'y a pas eu de majorité à l'appui de la sentence arbitrale du 31 juillet 1989 et la Cour devrait dire et juger que la sentence est frappée d'inexistence.

2. PRÉTENDUE NULLITÉ DE LA SENTENCE

La Guinée-Bissau prie la Cour de dire et juger, subsidiairement, que cette prétendue décision est absolument frappée de nullité et sans effet, le Tribunal n'ayant pas répondu à la seconde question posée dans le compromis, puisqu'il n'a pas décidé de la délimitation de l'ensemble des zones maritimes par une ligne unique de démarcation, qu'il n'a pas indiqué la démarcation au moyen d'une ligne portée sur une carte et qu'il n'a pas donné les motifs sur lesquels se fondait sa sentence.

L'arbitrage a prouvé son utilité pour le règlement pacifique des différends entre Etats. Mais on a vu aussi des abus, pouvant entraîner la nullité. Ce qui importe de manière déterminante est d'avoir une liste de ces cas de nullité, et aussi de prévoir quel organe international sera appelé à se prononcer sur les causes prétendues de nullité.

C'est en 1929 que le Gouvernement finlandais a proposé que cette question fasse l'objet d'un examen et recommandé de conférer le pouvoir de se prononcer sur les recours en nullité à la Cour permanente de Justice internationale. Le Conseil de la Société des Nations a nommé une commission de spécialistes pour étudier cette proposition. La même année, l'Institut de droit international a décidé d'inscrire à son ordre du jour la question de la création d'un organe pouvant connaître des appels en cassation des

tration tribunals. It was the International Law Commission of the United Nations which drafted and submitted in 1958 a set of "Model Rules on Arbitral Procedure", to which the attention of States was drawn.

In the "Model Rules", the following two Articles are pertinent:

> "*Article 35*
>
> The validity of an award may be challenged by either party on one or more of the following grounds:
>
> *(a)* that the tribunal has exceeded its powers;
> *(b)* that there was corruption on the part of a member of the tribunal;
> *(c)* that there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;
> *(d)* that the undertaking to arbitrate or the *compromis* is a nullity.
>
> *Article 36*
>
> 1. If, within three months of the date on which the validity of the award is contested, the parties have not agreed on another tribunal, the International Court of Justice shall be competent to declare the total or partial nullity of the award on the application of either party."

The concept of nullity has been considered broad enough to cover all serious irregularities in arbitration. However, most publicists are agreed that an arbitral award can be held to be null and void only in cases where the tribunal in question has "manifestly and in a substantial manner passed beyond the terms of submission" (K. S. Carlston, *The Process of International Arbitration*, p. 81, and the authorities quoted by him on pp. 81-84). After citing a number of eminent authorities such as Vattel, Bluntschli, Bonfils, Fauchille, Calvo, Oppenheim, Hall, Hyde, Castberg, Schatzel, Stoykovitch, Weiss, etc., Carlston concluded that

> "Claims of nullity should not be captiously raised. Writers who have given special study to the problem of nullity are agreed that the violation of the *compromis* should be so manifest as to be readily established. In order that a tribunal's decision or a jurisdictional issue shall be considered null, it must, in general, be arbitrary, not merely doubtful or arguable." (*Ibid.*, p. 86.)

In the present case, Guinea-Bissau alleged that the Arbitral Award of 31 July 1989 is a nullity because it fails to reply to the second question in Article 2, paragraph 2, of the *compromis*. Guinea-Bissau raises a number of arguments to prove that this was an *excès de pouvoir* and the Award is therefore a nullity. Before going into the merits of this claim, certain points should first be mentioned.

décisions des tribunaux d'arbitrage internationaux. Et c'est la Commission du droit international des Nations Unies qui a rédigé et présenté en 1958 le « Modèle de règles sur la procédure arbitrale », sur lequel a été appelée l'attention des Etats.

Parmi ces « règles », nous intéressent ici les deux dispositions suivantes :

> « *Article 35*
>
> La validité d'une sentence peut être contestée par toute partie pour l'une ou plusieurs des raisons suivantes :
>
> *a)* excès de pouvoir du tribunal ;
> *b)* corruption d'un membre du tribunal ;
> *c)* absence de motivation de la sentence ou dérogation grave à une règle fondamentale de procédure ;
> *d)* nullité de l'engagement d'arbitrage ou du compromis.
>
> *Article 36*
>
> 1. Si dans les trois mois de la date où la validité a été contestée, les parties ne se sont pas mises d'accord sur une autre juridiction, la Cour internationale de Justice est compétente pour prononcer, sur la demande de l'une des parties, la nullité totale ou partielle de la sentence. »

En fait, la notion de nullité a été considérée comme assez large pour embrasser tous les cas d'irrégularité grave dans l'arbitrage. Cela dit, la plupart des publicistes conviennent que la sentence arbitrale ne peut être considérée comme nulle et de nul effet que dans les cas où le tribunal a « manifestement et substantiellement outrepassé les termes du compromis » (K. S. Carlston, *The Process of International Arbitration*, p. 81, et les auteurs qu'il cite, p. 81-84). Après avoir cité un certain nombre d'éminents auteurs, tels que Vattel, Bluntschli, Bonfils, Fauchille, Calvo, Oppenheim, Hall, Hyde, Castberg, Schatzel, Stoykovitch, Weiss, etc., Carlston conclut que :

> « La nullité ne doit pas être invoquée dans un esprit de chicane. Les auteurs qui se sont particulièrement penchés sur le problème de la nullité s'accordent à penser que la violation des termes d'un compromis doit être si manifeste qu'elle s'établit de soi-même. Pour que la décision d'un tribunal ou la conclusion d'une juridiction soient considérées comme nulles, elles doivent d'une manière générale être arbitraires et pas simplement douteuses ou contestables. » (*Ibid.*, p. 86.)

Dans la présente espèce, la Guinée-Bissau soutient que la sentence arbitrale du 31 juillet 1989 est frappée de nullité parce qu'elle ne répond pas à la seconde question du paragraphe 2 de l'article 2 du compromis. La Guinée-Bissau avance un certain nombre d'arguments pour prouver qu'il y a là un cas d'excès de pouvoir et que la sentence est par conséquent frappée de nullité. Il y a lieu, avant d'examiner au fond cette allégation, de mentionner certains points.

To begin with, the term *excès de pouvoir* means that the Tribunal has exceeded or overstepped the powers which have been attributed to it by the Parties. What Guinea-Bissau now complains of is that the Tribunal has failed to exercise, not that it has exceeded, the powers vested in it (compare the wording of Article 11, paragraph 2, of the Statute of the United Nations Administrative Tribunal). The term "*excès de pouvoir* by omission" is a self-contradictory one. It is also questionable whether, if the Tribunal fails, in whole or in part, to exercise the powers vested in it, the appropriate remedy is to apply for nullification of the Award.

Secondly, the ground of Guinea-Bissau's complaint is the Tribunal's failure to reply to the second question, in Article 2, paragraph 2, of the *compromis*. But Guinea-Bissau makes no reference to the reply of the Award in respect of the first question, in Article 2, paragraph 1, of the *compromis*. No satisfactory reason is given as to why the whole Award must be nullified.

Be that as it may, the thrust of Guinea-Bissau's thesis is that, irrespective of the Tribunal's response concerning the value of the Franco-Portuguese Exchange of Letters, the Tribunal was called upon to proceed to a complete delimitation of the maritime territories. This interpretation is, however, in clear contradiction with the ordinary meaning to be given to the terms of the *compromis*. In the present case, a reply to the second question in Article 2, paragraph 2, of the *compromis* would have been mandatory only if the first question had been answered "in the negative". The obligation to reply to the second question is alternative, not simultaneous. Since the first question was replied to in the affirmative, the Tribunal was not called upon to reply to the second question. This follows from the ordinary and natural meaning of the relevant words. Such an interpretation is in perfect harmony with Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties.

Guinea-Bissau, however, argues that the Tribunal's reply to the first question is partially in the affirmative and partially in the negative; a partially negative reply is nevertheless a negative reply; the Tribunal was therefore under an obligation to give a reply to the second question. It should be recalled that, in the present case, there cannot be any such thing as a "partially affirmative and partially negative answer", since the question put in the *compromis* relates to the maritime boundary, as it existed at the time of conclusion of the Agreement in 1960, not thereafter. Indeed, the Award, in paragraph 85, clearly indicated that the Agreement had to be interpreted in the light of the law in force at the date of its conclusion. Therefore the Tribunal's reply to the first question with respect to the territorial sea, the contiguous zone and the continental shelf is a complete reply to the question put to the Tribunal. The word "solely" merely explains the scope of its decision. It cannot, therefore, be taken as a rejection of a part of the Parties' request and thus as a reason for characterizing the reply to the first question as a partially negative or even as an altogether negative answer.

En premier lieu, le terme « excès de pouvoir » signifie que le Tribunal a excédé ou outrepassé les pouvoirs que lui avaient conférés les Parties. Or, ce dont la Guinée-Bissau se plaint ici, c'est que le Tribunal n'a pas exercé le pouvoir qui lui était attribué, non qu'il a outrepassé ce pouvoir (voir, par comparaison, le libellé de l'article 11, paragraphe 2, du statut du Tribunal administratif des Nations Unies). L'expression « excès de pouvoir par omission » est une contradiction dans les termes. On peut d'autre part douter que lorsque le Tribunal manque à exercer la totalité ou une partie des pouvoirs qui lui sont attribués, la voie de recours adéquate soit l'annulation de la sentence.

En deuxième lieu, la Guinée-Bissau se plaint que le Tribunal n'ait pas répondu à la seconde question du paragraphe 2 de l'article 2 du compromis. Mais elle ne fait pas mention de la réponse que la sentence apporte à la première question, celle du paragraphe 1 de ce même article. Aucune raison satisfaisante n'est donnée pour expliquer pourquoi c'est l'ensemble de la sentence qui doit être annulé.

Quoi qu'il en soit, le fond de la thèse de la Guinée-Bissau est ceci : quelle qu'eût été sa réponse sur la valeur de l'échange de lettres entre la France et le Portugal, le Tribunal était appelé à procéder à une délimitation complète des territoires maritimes. Cette interprétation contredit cependant à l'évidence le sens ordinaire qu'il faut prêter aux termes du compromis. En la présente affaire, une réponse à la seconde question du paragraphe 2 de l'article 2 du compromis ne s'imposerait qu'en cas « de réponse négative » à la première question. L'obligation de répondre à la seconde question est alternative, elle n'est pas simultanée. Comme il a été répondu par l'affirmative à la première question, le Tribunal n'était pas tenu de répondre à la seconde. Tel est le sens ordinaire, le sens naturel des mots pertinents. Cette interprétation est tout à fait conforme aux dispositions de l'article 31, paragraphe 1, de la convention de Vienne sur le droit des traités.

La Guinée-Bissau n'en soutient pas moins que la réponse du Tribunal à la première question est en partie affirmative et en partie négative ; qu'une réponse en partie négative reste une réponse négative ; que le Tribunal était donc tenu de donner une réponse à la seconde question. On a déjà signalé qu'il ne peut y avoir en l'espèce de « réponse en partie affirmative et en partie négative », puisque la question posée dans le compromis concernait la frontière maritime telle qu'elle existait au moment de la conclusion de l'accord de 1960, et non postérieurement à celui-ci. Et, de fait, la sentence précise, au paragraphe 85, que l'accord doit être interprété à la lumière du droit en vigueur à la date de sa conclusion. Il s'ensuit que la réponse donnée par le Tribunal à la première question en ce qui concerne la mer territoriale, la zone contiguë et le plateau continental satisfait complètement à la question posée. L'expression « en ce qui concerne les *seules* zones » ne fait que préciser la portée de la décision. Elle ne peut donc être considérée comme un rejet d'une partie de la demande, ni servir, en tant que telle, à qualifier la réponse à la première question de réponse en partie négative, voire de réponse entièrement négative.

Guinea-Bissau further argues that since the entire dispute concerns the maritime boundary and since the title of the 1960 Agreement and the Preamble of the *compromis* both refer to the determination of the maritime boundary, it follows that whatever the reply given to the first question, the Tribunal should have proceeded to the second.

It must be pointed out that, in interpreting a treaty, such as the *compromis* in the present instance, whose text is clear and unambiguous, no attempt should be made to change the ordinary and natural meaning of the language used in the text by resorting to other elements and to interpret them as requiring under any circumstance the overall delimitation of the maritime boundary between the two States. It is primarily and clearly in the text of Article 2 of the *compromis* that the objective of the Parties is located. Here the Parties agreed that a reply to the second question is conditioned on a negative answer to the first. It cannot be envisaged that a mention of the delimitation of the maritime boundary in the title of the 1960 Agreement and in the Preamble of the *compromis* can have the effect of changing the meaning of the clear and unambiguous language of the text in Article 2 of the *compromis*.

Guinea-Bissau persistently maintained that it was the intention of the Parties that whatever the answer to the first question (in Article 2 of the Arbitration Agreement) the Tribunal was called upon to delimit the entire maritime boundary between the two States. But this contention does not find any support in the clear language of the *compromis*.

On the contrary, a passage in Guinea-Bissau's own Memorial submitted to the Tribunal reads:

> "The representatives of Senegal ended by *sharing this way of thinking* [my emphasis] and accordingly the Tribunal is requested to carry out a dual task: in the first place, to pronounce itself on the validity of the Franco-Portuguese Exchange of Letters of 16 April 1960 as a means of determining the maritime boundary between Guinea-Bissau and Senegal; *and, should this validity not be recognized* [Senegal's emphasis], to lay down the course of the line delimiting the maritime territories between the two States in accordance with the pertinent norms of positive international law." (Page 35 of Guinea-Bissau's Memorial before the Tribunal; quoted by Senegal on page 34 of its Counter-Memorial before the Tribunal.)

The above passage clearly affirms that it was Guinea-Bissau which proposed that the Tribunal be asked to pronounce on the validity of the 1960 Exchange of Letters and, *should this validity not be recognized*, to lay down the course of the line delimiting the maritime territories between the two States. And *this way of thinking* was *shared* by Senegal. Such has been the result of the negotiations between the two States and they well knew what they were agreeing to.

Although the passage quoted above was followed by a sentence, "In any event, at the conclusion of the arbitration the maritime delimitation between Guinea-Bissau and Senegal will have been effected", this can

Par ailleurs la Guinée-Bissau allègue que, puisque le litige porte en totalité sur la frontière maritime et que le titre de l'accord de 1960 et le préambule du compromis se réfèrent l'un et l'autre à la détermination de la frontière maritime, le Tribunal était tenu de répondre à la seconde question quelle que fût sa réponse à la première.

Il faut rappeler que lorsqu'on interprète un traité, comme ici le compromis, dont le texte est clair et sans ambiguïté, on ne doit pas chercher à modifier le sens ordinaire, le sens naturel des termes employés en recourant à des éléments auxiliaires, qu'on interpréterait comme exigeant en toutes circonstances la détermination de l'ensemble de la frontière maritime entre les deux Etats. C'est principalement dans le corps de l'article 2 du compromis que s'exprime le but poursuivi par les Parties. Elles y conviennent que la réponse à la seconde question est subordonnée à une réponse négative à la première. Il est inconcevable que le simple fait de mentionner la détermination de la frontière maritime dans le titre et dans le préambule du compromis ait eu pour effet de modifier le sens des dispositions d'un texte clair et sans ambiguïté, celui de l'article 2 du compromis.

La Guinée-Bissau n'a laissé de soutenir que l'intention des Parties était que, quelle que soit sa réponse à la première question (posée à l'article 2 du compromis d'arbitrage), le Tribunal devait délimiter dans sa totalité la frontière en mer entre les deux Etats. Mais on ne trouve rien pour étayer cette affirmation dans le libellé très clair du compromis.

Bien au contraire; il est un passage du mémoire présenté par la Guinée-Bissau au Tribunal qui se lit comme suit:

> « Les représentants du Sénégal finirent par *partager ce point de vue* [les italiques sont de moi] et c'est donc une double démarche qui est demandée au Tribunal: se prononcer d'abord sur la validité de l'échange de notes franco-portugais du 26 avril 1960 pour décider de la frontière en mer entre la Guinée-Bissau et le Sénégal. *Et si cette validité n'est pas reconnue* [les italiques sont du Sénégal] dire alors quel est le tracé de la ligne délimitant les territoires maritimes entre les deux Etats en se fondant sur les normes pertinentes du droit international positif. » (Mémoire présenté par la Guinée-Bissau au cours de la procédure arbitrale, p. 35; cité par le Sénégal dans son contre-mémoire dans le cadre de la procédure arbitrale, p. 34.)

Ce passage montre clairement que c'est la Guinée-Bissau qui a proposé de demander au Tribunal de se prononcer sur la validité de l'échange de lettres de 1960 et, *au cas où cette validité ne serait pas reconnue*, de tracer la ligne délimitant la frontière maritime entre les deux Etats. Et le Sénégal *s'est rangé à cette manière de voir.* Telle fut donc la conclusion des négociations entre les deux Etats, qui avaient pleinement conscience de ce dont ils convenaient.

Certes, ce passage était suivi de la phrase suivante: « En tout état de cause, à l'issue de l'arbitrage, la délimitation maritime entre la Guinée-Bissau et le Sénégal sera acquise. » Mais, par délimitation maritime, on ne

only mean the delimitation of those maritime spaces which existed at the time of the conclusion of the 1960 Agreement, because it was the 1960 Agreement which was in dispute. If the Parties had intended that there should be an *ex novo* delimitation of the entire maritime boundary, irrespective of the result of the examination of the validity of the Franco-Portuguese Exchange of Letters of 1960, they would have said so in the *compromis*. Since this was not only a relevant, but a crucial point, they could not have neglected to do so. Negotiations had been carried on for eight years. How could a point of such substance and significance have been overlooked? There is no evidence of any dispute having arisen between the Parties on this point during their negotiations. On the contrary, the 11 prefatory words in Article 2, paragraph 2, were proposed by Guinea-Bissau itself (Senegalese Counter-Memorial in the present proceedings, pp. 29, 33, 38 and 44; also public sitting of 5 April 1991, CR 91/4, p. 4[illegible].

Guinea-Bissau also asserts that the various components of the maritime areas are indivisible. But this alleged indivisibility, even if the Parties had so intended would not have removed the condition which the Parties expressly laid down in Article 2, paragraph 2, of the *compromis*. Whether or not the line is divisible is a question of how the line is to be drawn, arising if the first question is answered in the affirmative. It does not change the fundamental relationship between the two questions put in Article 2, which is that the reply to the second one is conditioned on the first question being answered in the negative.

It is to be noted that both Parties emphasized that they wanted a single line of delimitation, but they viewed this concept differently. For its part, Guinea-Bissau wished to have the continental shelf and the exclusive economic zone re-aligned, by means of a synthetic line, on the basis of equitable principles. As for Senegal, it wished to have the existing 240° line raised to divide the exclusive economic zone. The argument of indivisibility, which seeks to identify the various components of the maritime boundary and make them coincide, cannot therefore be used to support Guinea-Bissau's thesis that whatever the reply to the first question, the Tribunal should have proceeded to the *ex novo* delimitation in accordance with the second question.

Nor can it be said that the Tribunal's *task* is indivisible. The Tribunal was asked to determine, if it answered the first question in the negative, the course of the line forming the maritime boundary. The first question was answered in the affirmative, and there the task of the Tribunal ended. Guinea-Bissau cannot now claim that something was left undone. This "something" did not and cannot form the object of arbitration because it did not exist at the time of the conclusion of the 1960 Agreement.

It is true that in the preambular part of Article 2 and also in Article 9,

pouvait entendre que les espaces maritimes qui existaient à l'époque de la conclusion du compromis de 1960, puisque c'était précisément ce compromis de 1960 qui était controversé. Si les Parties étaient convenues qu'il fallait procéder à une délimitation *ex novo* de toute la frontière en mer quel que fût le résultat de l'examen de la validité de l'échange de lettres de 1960 entre la France et le Portugal, elles l'auraient dit dans le compromis. Et comme il s'agit là d'un point non seulement pertinent mais d'une importance majeure, elles n'auraient pas négligé de le faire. Les négociations se sont étendues sur huit années. Comment imaginer qu'un point aussi fondamental et aussi important aurait pu être négligé ? Il n'y a aucune preuve que pendant leurs négociations il se soit élevé quelque différend entre les deux Parties sur ce point. Au contraire, les neuf mots introductifs du paragraphe 2 de l'article 2 ont été proposés par la Guinée-Bissau elle-même (contre-mémoire du Sénégal déposé dans la présente instance, p. 29, 33, 38 et 44; voir aussi audience publique du 5 avril 1991, CR 91/4, p. 45).

La Guinée-Bissau affirme aussi que les diverses composantes des zones maritimes sont indivisibles. Mais cet appel à la notion d'indivisibilité, si tant est qu'il fût dans l'intention des Parties, n'écarte pas la condition que celles-ci ont expressément posée à l'article 2, paragraphe 2, du compromis. Que la ligne soit ou non divisible est fonction de la manière dont elle est tracée, question ne se posant que si la réponse à la première question était affirmative. Cela ne change rien à la relation fondamentale entre les deux questions posées à l'article 2, à savoir que la réponse à la seconde question est subordonnée à une réponse négative à la première.

Il convient de noter que les deux Parties ont souligné qu'elles voulaient une ligne de démarcation unique, mais leur point de vue n'était pas le même. La Guinée-Bissau pour sa part souhaitait une ligne de démarcation intégrée du plateau continental et de la zone économique exclusive, ligne redéfinie selon des principes équitables. Le Sénégal de son côté souhaitait que la ligne d'azimut 240° existante soit élevée de manière à diviser la zone économique exclusive. L'argument de l'indivisibilité, par lequel on cherche à identifier les divers éléments de la frontière maritime et à les faire coïncider, ne peut donc servir à corroborer la thèse de la Guinée-Bissau selon laquelle, quelle qu'eût été sa réponse à la première question, le Tribunal aurait dû procéder à la délimitation *ex novo* conformément à la seconde.

On ne peut non plus prétendre que la *tâche* du Tribunal ait été indivisible. Il était appelé, si sa réponse à la première question était négative, à déterminer le tracé de la ligne de démarcation des territoires maritimes. La réponse à la première question a été affirmative, et la mission du Tribunal n'allait pas plus loin. La Guinée-Bissau n'est pas fondée à prétendre maintenant que quelque chose a été laissé en suspens. Cette « chose » ne pouvait et ne peut toujours pas constituer l'objet de l'arbitrage, car elle n'existait pas au moment de la conclusion de l'accord de 1960.

Il est vrai que dans le chapeau de l'article 2 du compromis, puis encore

paragraph 1, of the *compromis*, the word "question" was used in the plural. But such details of drafting cannot be relied upon to contradict the meaning of the instrument as a whole, since at the time of its conclusion it was not known whether both questions might have to be answered or not.

Guinea-Bissau has further contended that the Tribunal failed to exercise its power under the *compromis* to make a decision on the course of a single line delimiting all the maritime spaces and to indicate the boundary line on a map. Since, as has been said before, the Tribunal was not called upon to answer the second question, there was no occasion to delimit such a boundary line and it naturally followed that no map could have been appended.

As to the question of whether or not there has been sufficiency of reasoning, it is important not to base oneself solely on paragraph 87 of the Award. Paragraph 87 only reaches a reasoned conclusion from what has been discussed. The reasons in support of the conclusion arrived at in paragraph 87 were, to a large extent, given earlier in the Award. The principal point is the affirmation of the validity of the 1960 Agreement, as a consequence of which the second question did not have to be answered. And since no *ex novo* delimitation of the maritime boundary was to take place, a map could not have been produced. All these points are interrelated. The reason is self-evident. There is no basis for regarding the question of the map as an independent matter and saying that no adequate reason is given for its omission.

The line of reasoning that led the Tribunal to the conclusion in paragraph 87 is clear. After analysing the question of the validity of the 1960 Agreement, the Tribunal, in paragraph 80 of the Award, observes that "the 1960 Agreement is valid and can be opposed to Senegal and to Guinea-Bissau". In paragraph 85 of the Award, the Tribunal states that the 1960 Agreement must be interpreted in the light of the law in force at the date of its conclusion. Then it concludes in the same paragraph that the Agreement does not delimit the maritime spaces which did not exist at that date, whether they be termed "exclusive economic zone", "fishery zone" or whatever.

It is also to be noted that paragraph 87 and paragraph 88 are intimately linked to each other. In paragraph 88 the Tribunal found that the 1960 Agreement had the force of law in the relations between Guinea-Bissau and Senegal with regard to the areas mentioned in that Agreement. Consequently, by the terms of Article 2 of the Arbitration Agreement, the Tribunal did not have to answer the second question. Such was the conclusion of paragraph 87 of the Award. When the Tribunal adopted paragraph 88 by two votes to one, it necessarily endorsed the reasoning behind paragraph 87.

On the basis of such analysis and conclusions, the Tribunal then concluded that it was not called upon to reply to the second question. The decision on the question of the map follows that on delimitation of the maritime boundary. Since the first question put in Article 2 of the *compro-*

au paragraphe 1 de l'article 9, le mot « question » est employé au pluriel. Un point technique de rédaction ne peut cependant être ainsi opposé au sens de l'ensemble de l'instrument considéré puisque au moment de la rédaction de celui-ci il n'était pas certain que les deux questions dussent recevoir une réponse.

La Guinée-Bissau allègue en outre que le Tribunal n'a pas exercé le pouvoir qui lui était conféré de décider du tracé d'une ligne unique pour délimiter les territoires maritimes, et de porter cette ligne sur une carte. Puisque, comme on l'a dit plus haut, le Tribunal n'était pas appelé à répondre à la seconde question, il n'y avait pas lieu de tracer la ligne frontière ni, à fortiori, de joindre une carte à la sentence.

Quant à savoir si les motifs sont suffisants, il ne faut pas borner l'examen au seul paragraphe 87 de la sentence. Celui-ci ne fait en effet que conclure sur la base de ce qui a été précédemment analysé. Les motifs sur lesquels s'appuie la conclusion à laquelle on est arrivé dans ce paragraphe ont été exposés auparavant dans la sentence. Le point principal en est l'affirmation de la validité de l'accord de 1960, dont il découle que la seconde question n'appelle pas de réponse. Et puisqu'il ne doit y avoir aucune délimitation *ex novo* de la frontière en mer, il n'y avait pas lieu de joindre une carte. Toutes ces choses-là sont indissociables. La raison en va de soi. Il est vain de vouloir considérer la question de la carte comme un sujet indépendant et de prétendre qu'aucun motif suffisant n'est donné à ce propos.

On peut suivre le fil de la pensée qui aboutit à la conclusion du paragraphe 87. Après avoir analysé la question de la validité de l'accord de 1960, le Tribunal, au paragraphe 80 de la sentence, fait observer que « l'accord de 1960 est valable et opposable au Sénégal et à la Guinée-Bissau ». Au paragraphe 85, il dit que l'accord doit être interprété à la lumière du droit en vigueur à la date de sa signature. Et de conclure, dans le même paragraphe, que l'accord ne délimite pas les espaces maritimes qui n'existaient pas à cette date, qu'on les appelle « zone économique exclusive », « zone de pêche » ou autrement.

Il convient également de noter que les paragraphes 87 et 88 sont intimement liés. Au paragraphe 88, le Tribunal estime que le compromis de 1960 fait droit dans les relations entre la Guinée-Bissau et le Sénégal en ce qui concerne les zones mentionnées dans cet accord. Par conséquent, en vertu des termes de l'article 2 du compromis d'arbitrage, le Tribunal n'avait pas à répondre à la seconde question. Telle est la conclusion figurant au paragraphe 87 de la sentence. Lorsque le Tribunal a adopté le paragraphe 88 par deux voix contre une, il approuvait par la force des choses le raisonnement sur lequel se fonde le paragraphe 87.

Sur la base de ces analyses et de ces déductions, le Tribunal a alors conclu qu'il n'avait pas à répondre à la seconde question. La réponse à la question de la carte découle de la décision prise à propos de la délimitation de la frontière en mer. Puisqu'il a été répondu par l'affirmative à la

mis was answered in the affirmative, no *ex novo* delimitation took place. Consequently, no map was called for. The reasoning is succinct, but it is sufficiently clear for the purposes of the Award.

For the foregoing reasons, Guinea-Bissau's subsidiary submission that the Award of 31 July 1989 should be declared a nullity cannot be sustained.

(Signed) NI Zhengyu.

première question de l'article 2, il n'y a pas eu de délimitation *ex novo*. Par conséquent, la carte ne s'imposait pas. Le raisonnement est succinct mais suffisamment limpide pour les besoins de la sentence.

Pour toutes ces raisons, la conclusion subsidiaire de la Guinée-Bissau selon laquelle la sentence du 31 juillet 1989 devrait être frappée de nullité ne saurait se défendre.

(Signé) NI Zhengyu.

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

I agree with the decision reached by the Court. My thought is that, on some aspects, it could have been stronger than it is. On the main issue as to whether the Tribunal should have answered the second question put to it by the Arbitration Agreement, the Court sustains the Award on the ground that, in holding that it was not competent to reply to that question, the Tribunal interpreted the Agreement in a way in which it could have been interpreted without manifest breach of its competence. The Court did not go on to consider whether the Tribunal's interpretation was indeed correct. The explanation lies in the view which the Court took of the scope of its own authority in these proceedings. I give my reasons below for holding, first, that, subject to considerations of security of the arbitral process with respect to finality of awards, the scope of the Court's authority did not preclude it from pronouncing on the correctness of the Tribunal's interpretation; and, second, that the latter was in fact the correct interpretation.

I. WHETHER IT WAS COMPETENT FOR THE COURT TO PRONOUNCE ON THE CORRECTNESS OF THE TRIBUNAL'S INTERPRETATION OF THE *COMPROMIS*

Guinea-Bissau's chief complaint is that the Arbitration Tribunal failed to accomplish its mission, in that it was required to answer the second question put to it by the Arbitration Agreement but did not do so, and that on this account the Award is a nullity. It appears to me that, the Court having held that it had jurisdiction, the appropriate course was for it to determine, in accordance with the applicable principles of treaty interpretation, whether the Arbitration Agreement did require the Tribunal to answer that question. If the Court's interpretation differed from that of the Tribunal, the next step was to see if the latter was equally plausible with the former. If the two were equally plausible, as being each justified by some legitimate process of interpretation, considerations of security of the arbitral process with respect to finality of awards would suggest that the Court should refrain from substituting its own interpretation for that of the Tribunal. The Court would be justified in making a substitution only where it was satisfied that the Tribunal's interpretation disclosed a compellingly clear and substantial error as to its powers. A marginal or debatable case would not suffice.

I should have thought, with respect, that this approach was reasonably straightforward; that it had the advantage of enabling the Court to resolve

OPINION INDIVIDUELLE DE M. SHAHABUDDEEN

[Traduction]

Je suis d'accord avec la décision de la Cour. J'estime toutefois que celle-ci, sur certains points, aurait pu se montrer plus ferme encore. Sur le point capital de savoir si le Tribunal aurait dû répondre à la seconde question qui lui était posée dans le compromis d'arbitrage, la Cour reconnaît la validité de la sentence en considérant qu'en se disant non compétent pour répondre à cette question le Tribunal avait interprété le compromis de l'une des manières dont il était possible de l'interpréter sans qu'il y ait méconnaissance manifeste de sa compétence. La Cour ne s'est pas prononcée ensuite sur la justesse de l'interprétation du Tribunal, et ce à cause de sa conception de la portée de sa propre autorité en cette affaire. Je précise ci-après les raisons pour lesquelles je soutiens, premièrement, que sous réserve des considérations relatives à la sécurité du processus arbitral quant au caractère définitif des sentences, l'autorité de la Cour ne l'empêchait nullement de se prononcer sur la justesse de l'interprétation que le Tribunal a fait sienne et, deuxièmement, que cette interprétation était en fait l'interprétation correcte.

I. LA COUR AVAIT-ELLE COMPÉTENCE POUR SE PRONONCER SUR LA JUSTESSE DE L'INTERPRÉTATION DU COMPROMIS PAR LE TRIBUNAL ?

Le grief principal de la Guinée-Bissau est que le Tribunal arbitral a failli à sa tâche, car il était tenu de répondre à la seconde question du compromis d'arbitrage et il ne l'a pas fait, raison pour laquelle la sentence est nulle. Il me semble que, la Cour s'étant déclarée compétente, la démarche à suivre était de déterminer, conformément aux principes applicables à l'interprétation des traités, si le compromis d'arbitrage exigeait effectivement que le Tribunal réponde à cette question. Si l'interprétation de la Cour était différente de celle du Tribunal, il fallait ensuite déterminer si celle du Tribunal était aussi plausible que celle de la Cour. Si les deux étaient également plausibles, chacune étant justifiée par un processus légitime d'interprétation, des considérations tenant à la sécurité des procédures d'arbitrage quant au caractère définitif des sentences laisseraient supposer que la Cour devrait s'abstenir de remplacer l'interprétation du Tribunal par la sienne propre. La Cour pourrait le faire uniquement si elle s'était satisfaite que l'interprétation du Tribunal constituait une erreur manifeste et grave au regard de son mandat. Une argumentation marginale ou contestable ne suffirait pas.

J'aurais pensé, avec tout le respect que je dois à la Cour, qu'il s'agissait là d'une démarche relativement directe; qu'elle avait l'avantage de

the point of substance, and of obvious concern to Guinea-Bissau, as to whether the Tribunal's interpretation was right or wrong; and that it provided all the safeguards fairly needed to ensure the stability of the international arbitral process.

That has not however been the course followed by the Court. The drift of the Court's reasoning moves, indeed, in the direction of a finding that the Tribunal was right in holding that it was not competent to answer the second question, and the reader of the Judgment (particularly paragraph 56) may well think that this is the natural result. The Court, however, stops short of making a finding to that effect, limiting itself to a holding in these terms:

> "The Tribunal could thus find, without manifest breach of its competence, that its answer to the first question was not a negative one, and that it was therefore not competent to answer the second question." (Judgment, para. 60.)

The Judgment thus stands arrested at the threshold of the issue whether the Tribunal was correct in its interpretation of the *compromis* on the specific point as to whether it was competent to answer the second question. The reason is to be found in the Court's use of the distinction between nullity and appeal in relation to decisions made in exercise of *la compétence de la compétence.* Referring to Guinea-Bissau's argument on the point in question, the Judgment reads:

> "By its argument set out above, Guinea-Bissau is in fact criticizing the interpretation in the Award of the provisions of the Arbitration Agreement which determine the Tribunal's jurisdiction, and proposing another interpretation. However, the Court does not have to enquire whether or not the Arbitration Agreement could, with regard to the Tribunal's competence, be interpreted in a number of ways, and if so to consider which would have been preferable. By proceeding in that way the Court would be treating the request as an appeal and not as a *recours en nullité.* The Court could not act in that way in the present case. It has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction." (Judgment, para. 47.)

The problem with this approach is that, apart from leaving undetermined a question of importance to one of the litigants as to whether the Tribunal's interpretation was in fact correct, it, at least theoretically, leaves open the possibility that the interpretation was not. For, to characterize the Tribunal's interpretation as being merely one which could be placed on the Arbitration Agreement "without manifest breach of its competence" is to leave open the possibility that some other interpretation could also be placed on it "without manifest breach of its competence";

permettre à la Cour de résoudre la question de fond, qui intéressait de toute évidence la Guinée-Bissau, de savoir si l'interprétation du Tribunal était juste ou non; et que cette démarche aurait offert toutes les garanties nécessaires à la stabilité de la procédure d'arbitrage international.

La Cour toutefois n'a pas adopté cette démarche. Le raisonnement de la Cour tend plutôt à conclure que le Tribunal avait raison d'affirmer qu'il n'était pas compétent pour répondre à la seconde question et tout lecteur de l'arrêt (et en particulier de son paragraphe 56) est en droit de penser que c'est là la conclusion naturelle. La Cour, cependant, s'arrête avant de parvenir à cette conclusion, se limitant à dire que:

> « Dès lors, le Tribunal a pu, sans méconnaître manifestement sa compétence, juger que la réponse qu'il avait donnée à la première question n'était pas négative, et que par suite il n'avait pas compétence pour répondre à la seconde. » (Arrêt, par. 60.)

L'arrêt n'aborde donc pas la question de savoir si le Tribunal a interprété correctement le compromis pour ce qui est du point spécifique qu'était sa compétence de répondre à la seconde question. La raison s'en trouve dans la distinction qu'effectue la Cour entre recours en nullité et appel au regard de décisions faites dans l'exercice de la compétence de la compétence. Evoquant l'argumentation de la Guinée-Bissau sur cette question, l'arrêt dit ceci:

> « Par le moyen susmentionné, la Guinée-Bissau critique en réalité l'interprétation donnée dans la sentence des dispositions du compromis qui déterminent la compétence du Tribunal, et en propose une autre. Mais la Cour n'a pas à se demander si le compromis était susceptible ou non de plusieurs interprétations en ce qui concerne la compétence du Tribunal, et dans l'affirmative à s'interroger sur celle qui eût été préférable. En procédant de la sorte, la Cour traiterait en effet la requête comme un appel et non comme un recours en nullité. La Cour ne saurait procéder de la sorte en l'espèce. Elle doit seulement rechercher si le Tribunal, en rendant la sentence contestée, a manifestement méconnu la compétence qui lui avait été donnée par le compromis, en outrepassant sa compétence ou en ne l'exerçant pas. » (Arrêt, par. 47.)

Le problème que suscite cette approche est que tout en laissant sans réponse une question qui importe à l'une des Parties au différend, à savoir la justesse ou non de l'interprétation du Tribunal, elle ouvre la possibilité, du moins en théorie, que l'interprétation ait été incorrecte. Car si l'on prétend que l'interprétation du Tribunal était simplement une des interprétations qu'il était possible de donner au compromis d'arbitrage « sans qu'il y ait méconnaissance manifeste de sa compétence », on laisse subsister la possibilité qu'une autre interprétation du compromis fût possible,

paragraph 47 of the Judgment, quoted above, accepts as much. All of such possible interpretations could not be right.

The foundation of the Court's approach lies in the concept of *la compétence de la compétence.* Certain aspects of the scope and basis of this power may be briefly noticed for present purposes.

First, as to the scope of the power. This is indeed wide. But, wide as is the power, its exercise is, of course, limited by the consideration that its purpose is to ensure that the mission authorized by the *compromis* does not fail for want of power to interpret the latter, as historically it was once feared possible; the purpose is not to permit the Tribunal, through possible misinterpretations, to endow itself with an original jurisdiction materially different from that contemplated by the Parties. This, if it happened, would be ruinous to the older and even more fundamental principle *extra compromissum arbiter nihil facere potest.* As observed by one commentator, recalling the position taken by the United States commissioner in *The Betsey,* "La règle de la compétence de la compétence et l'excès de pouvoir ne se concevaient pas l'un sans l'autre: mieux ils s'expliquaient l'un par l'autre" (Georges Berlia, "Jurisprudence des tribunaux internationaux en ce qui concerne leur compétence", *Collected Courses of the Hague Academy of International Law,* Vol. 88, p. 109, at p. 129). In the words of another, "si l'arbitre est juge de sa compétence, il n'en est pas le maître" (Charles Rousseau, *Droit international public,* Vol. 5, 1983, p. 326, para. 312). That the two principles referred to are in tension has been noticed in the literature (R. Y. Jennings, "Nullity and Effectiveness in International Law", in *Cambridge Essays in International Law, Essays in Honour of Lord McNair,* 1965, p. 64, at p. 83). In the present case, that general tension surfaces as a specific legal problem needing to be addressed and resolved by the Court. In short, *la compétence de la compétence* being not absolute but qualified, the question here, as in all cases, is not whether the Tribunal has exercised the competence *simpliciter,* but whether the Tribunal has exercised it within the bounds to which it is always and necessarily subject.

Next, as to the basis of the power. The question has been discussed in the books as to whether the finality of an arbitral award rests on the treaty of submission or on the authority which international law attaches to decisions of tribunals vested with jurisdiction to decide with obligatory force, or indeed on both (see, *inter alia,* Louis Cavaré, "L'arrêt de la CIJ du 18 novembre 1960 et les moyens d'assurer l'exécution des sentences arbitrales", in *Mélanges offerts à Henri Rolin,* 1964, p. 39, at pp. 41-42; and J. C. Witenberg, *L'organisation judiciaire, la procédure et la sentence internationales,* 1937, pp. 352-353). That the treaty of submission does have a role is, however, generally admitted. Hertz connected the two ideas this way:

qui serait elle aussi une interprétation qui pouvait être retenue sans qu'il y ait « méconnaissance manifeste de sa compétence » ; le paragraphe 47 de l'arrêt, cité ci-dessus, admet ces conclusions. Or, toutes les interprétations possibles ne sauraient être justes.

La démarche de la Cour s'appuie sur le concept de la compétence de la compétence. Certains aspects de la portée et du fondement de ce pouvoir méritent qu'on s'y arrête brièvement.

Pour ce qui est de la portée de ce pouvoir, elle est certes très large. Mais aussi large fût-elle, son exercice est évidemment limité par une considération relative à son but, qui est de faire en sorte que la mission que le compromis confie au Tribunal n'en vienne pas à échouer par absence de compétence à interpréter le compromis — comme, historiquement, on l'a craint — et non de permettre au Tribunal, par d'éventuelles fausses interprétations, de s'arroger une compétence originelle sensiblement différente de celle envisagée par les Parties. Si tel était le cas, ce serait la fin d'un principe plus ancien et plus fondamental encore, celui qu'exprime l'adage *extra compromissum arbiter nihil facere potest.* Comme l'a fait observer un commentateur, en rappelant la position prise par le délégué des Etats-Unis dans l'affaire *The Betsey*: « La règle de la compétence de la compétence et l'excès de pouvoir ne se concevaient pas l'un sans l'autre : mieux ils s'expliquaient l'un par l'autre. » (Georges Berlia, « Jurisprudence des tribunaux internationaux en ce qui concerne leur compétence », *Recueil des cours de l'Académie de droit international de La Haye*, t. 88, p. 129.) Ou, comme l'a dit un autre auteur : « si l'arbitre est juge de sa compétence, il n'en est pas le maître » (Charles Rousseau, *Droit international public*, vol. 5, 1983, p. 326, par. 312). L'antagonisme existant entre ces deux principes a été relevé par la doctrine (R. Y. Jennings, « Nullity and Effectiveness in International Law », dans *Cambridge Essays in International Law, Essays in Honour of Lord McNair*, 1965, p. 83). En cette instance, cet antagonisme général constitue le problème juridique spécifique que la Cour se doit d'examiner et de résoudre. Bref, la compétence de la compétence n'est pas absolue, mais qualifiée ; la question qui se pose dans cette affaire, comme dans toute affaire, est non de savoir si l'arbitre a exercé sa compétence *simpliciter*, mais s'il l'a exercée dans les limites auxquelles cette compétence est toujours et nécessairement soumise.

Quant au fondement de ce pouvoir, la question a été posée dans de nombreuses études de savoir si le caractère définitif d'une sentence arbitrale repose sur le compromis ou sur l'autorité que le droit international confère aux décisions des tribunaux investis du pouvoir de rendre des décisions obligatoires, ou encore sur les deux (voir, entre autres, Louis Cavaré, « L'arrêt de la CIJ du 18 novembre 1960 et les moyens d'assurer l'exécution des sentences arbitrales », dans *Mélanges offerts à Henri Rolin*, 1964, p. 41-42, et J. C. Witenberg, *L'organisation judiciaire, la procédure et la sentence internationales*, 1937, p. 352-353). Il est cependant généralement admis qu'un rôle revient au compromis. Hertz met en rapport ces deux idées comme suit :

> "La source du caractère obligatoire de la sentence arbitrale ne vient pas d'en haut, d'une autorité supérieure, mais d'en bas, d'un traité conclu par les parties, qui se soumettent ainsi à la norme du droit coutumier international *'pacta sunt servanda'*, qui est en même temps la norme fondamentale du droit des gens conventionnel." (Wilhelm G. Hertz, "Les 'fondements' de la nullité dans la justice internationale", *Revue internationale de la théorie du droit*, 1938, Vol. 12, p. 327, at p. 331.)

Carlston gave his understanding of the position in these words:

> "By entering into the arbitration agreement and participating in the proceedings before the tribunal, the parties impliedly engage to execute the award when rendered." (K. S. Carlston, *The Process of International Arbitration*, 1946, p. 205.)

The finality of an arbitral award is a well-settled part of customary international law; but it is a part of the law which leans on the actual or presumed will of the parties.

It is likewise the case that "[t]he competence of an arbitral tribunal to decide questions of its own jurisdiction is unquestionably firmly established as a principle of international arbitral law" (*ibid.*, p. 74). Many authorities attest to the principle and rightly proclaim its importance. But it seems to me that the law on the point, clear and settled as it is, is itself founded on the theory of such competence being ultimately derived from a grant presumed by law to have been made to the tribunal by the parties, who are always competent to do so expressly. This is illustrated by Article 14 of the 1875 draft Arbitral Procedure of the Institut de droit international, reading:

> "Dans le cas où le doute sur la compétence dépend de l'interprétation d'une clause du compromis, les parties sont censées avoir donné aux arbitres la faculté de trancher la question, sauf clause contraire." (Ernest Lehr, *Tableau général de l'organisation, des travaux et du personnel de l'Institut de droit international pendant les deux premières périodes décennales de son existence (1873-1892)*, 1893, p. 127.)

Some 80 years later, this significant "clause contraire" was reflected in the Court's statement in the *Nottebohm* case (cited in paragraph 46 of the Judgment in the present case) to the effect

> "that, *in the absence of any agreement to the contrary*, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction" (*I.C.J. Reports 1953*, p. 119; emphasis added; and see Berlia, *loc. cit.*, p. 117).

The theory, it would seem, is that, where they abstain from exercising their right to exclude the power, the parties "sont censées avoir donné aux arbitres la faculté de trancher la question".

> « La source du caractère obligatoire de la sentence arbitrale ne vient pas d'en haut, d'une autorité supérieure, mais d'en bas, d'un traité conclu par les parties, qui se soumettent ainsi à la norme du droit coutumier international *« pacta sunt servanda »*, qui est en même temps la norme fondamentale du droit des gens conventionnel. » (Wilhelm G. Hertz, « Les « fondements » de la nullité dans la justice internationale », *Revue internationale de la théorie du droit*, 1938, vol. 12, p. 331.)

Quant à Carlston, sa position est la suivante :

> « En concluant l'accord d'arbitrage et en participant à la procédure devant le tribunal, les parties s'engagent implicitement à appliquer la sentence une fois prononcée. » (K. S. Carlston, *The Process of International Arbitration*, 1946, p. 205.)

Le caractère définitif de la sentence arbitrale constitue un élément bien assis du droit international coutumier, mais c'est un élément qui s'appuie sur la volonté réelle ou présumée des parties.

Il est vrai également que « [l]a compétence d'un tribunal arbitral à trancher les questions de sa propre compétence est incontestablement et fermement établi comme principe du droit international de l'arbitrage » (*ibid.*, p. 74). De nombreux auteurs confirment ce principe et insistent à juste titre sur son importance. Mais il me semble que le droit sur ce point, aussi clair et établi soit-il, s'appuie à son tour sur la théorie selon laquelle, en dernière instance, cette compétence est censée, en droit, avoir été conférée au tribunal par les parties, qui ont toujours le droit de le faire expressément. C'est ce qu'illustre l'article 14 du projet de procédure arbitrale de 1875 de l'Institut de droit international, qui est le suivant :

> « Dans le cas où le doute sur la compétence dépend de l'interprétation d'une clause du compromis, les parties sont censées avoir donné aux arbitres la faculté de trancher la question, sauf clause contraire. » (Ernest Lehr, *Tableau général de l'organisation, des travaux et du personnel de l'Institut de droit international pendant les deux premières périodes décennales de son existence (1873-1892)*, 1893, p. 127.)

Quelque quatre-vingts ans plus tard, cette « clause contraire » significative est reflétée dans les propos de la Cour dans l'affaire *Nottebohm* (citée au paragraphe 46 de l'arrêt en cette instance) selon lesquels

> « *à moins de convention contraire*, un tribunal international est juge de sa propre compétence et a le pouvoir d'interpréter à cet effet les actes qui gouvernent celle-ci » (*C.I.J. Recueil 1953*, p. 119 ; les italiques sont de moi ; voir également Berlia, *loc. cit.*, p. 117).

Il semblerait que la théorie veuille que, lorsqu'elles s'abstiennent d'exercer leur droit d'exclure ce pouvoir, les parties « sont censées avoir donné aux arbitres la faculté de trancher la question ».

From the point of view of the scope and basis of *la compétence de la compétence*, the juridical problem which arises may therefore be expressed thus: when the parties invest an arbitrator, whether expressly or by implication of law, with competence to interpret the *compromis*, within what limits, if any, are they to be understood as thereby engaging to be bound by an exercise of the competence by the arbitrator which results in a misinterpretation by him of the *compromis* concerning his powers? In the present case, the question would be whether it was the will of the Parties that they should be bound by a misinterpretation — if there was any — of the *compromis* on the important and major issue as to whether the second question was required to be answered. Conceivably, in the larger interests of securing a resolution of their dispute, the Parties might be understood as having undertaken to be bound by decisions made within some tolerable margin of appreciation as to competence in minor matters even though erroneous. Should they be understood as having undertaken to be likewise bound by erroneous decisions as to the powers of the Tribunal going to the substance of its mission? Scarcely so. But then, when such a question arises, as it in effect arises here, how is it to be answered unless the Court can say whether, as a matter of treaty interpretation, the Tribunal's decision was indeed correct? It is not clear why the Court must instead regard the matter as concluded by the fact that the Tribunal has placed on the *compromis* an interpretation which could have been placed on it without manifest breach of its competence. That way of putting it leaves open the possibility that, while such an interpretation might well be right, it could, at least in theory, be also wrong.

It may be useful to consider two cases involving contentions of nullity of an arbitral award, namely, the *Orinoco Steamship Co.* case and the case of the *Arbitral Award Made by the King of Spain on 23 December 1906.*

In the *Orinoco Steamship Co.* case the Permanent Court of Arbitration made the point that "the appreciation of the facts of the case and the interpretation of the documents were within the competence of the umpire" and that —

> "his decisions, when based on such interpretation, are not subject to revision by this tribunal, whose duty it is not to say if the case has been well or ill judged, but whether the award must be annulled; that if an arbitral decision could be disputed on the ground of erroneous appreciation, appeal and revision, which the Conventions of the Hague of 1899 and 1907 made it their object to avert, would be the general rule" (*The Hague Court Reports*, ed. J. B. Scott, 1916, p. 226, at p. 231).

These remarks, particularly about "the appreciation of the facts of the case and the interpretation of the documents" being "within the competence of the umpire", related to decisions made by him on the merits of the case, not to decisions made by him in exercise of *la compétence de la*

Du point de vue de la portée et du fondement de la compétence de la compétence, le problème juridique qui se pose peut donc se formuler comme suit : en confiant à l'arbitre, que ce soit expressément ou par l'effet du droit, la compétence pour interpréter le compromis, dans quelles limites, si limite il y a, les parties s'engagent-elles à être liées par l'exercice de la compétence de l'arbitre qui entraînerait une interprétation erronée du compromis à propos de ses pouvoirs ? En l'occurrence, la question serait de savoir si les parties acceptaient d'être liées par une interprétation erronée — le cas échéant — du compromis sur le point important et majeur de savoir si la seconde question devait recevoir une réponse. Il est concevable que, dans le but plus général d'obtenir un règlement de leur différend, les parties soient convenues d'accepter d'être liées par des décisions prises dans une marge tolérable d'appréciation quant à la compétence sur des points mineurs, même si ces décisions se révèlent être erronées. Peut-on aller jusqu'à concevoir que les parties accepteraient aussi d'être liées de la même manière par des décisions erronées quant aux pouvoirs du tribunal affectant le fond de sa mission ? Certes non. Mais alors, lorsqu'une question comme celle-là se pose, comme elle se pose ici, comment la résoudre si la Cour ne peut affirmer, du point de vue de l'interprétation des traités, que la décision du Tribunal était en fait la bonne ? On comprend mal la raison pour laquelle la Cour doit considérer le problème comme réglé par le fait que le Tribunal a donné au compromis une interprétation qui aurait pu être donnée sans méconnaissance manifeste de sa compétence. Cette façon de voir les choses laisse subsister la possibilité que si une telle interprétation peut fort bien s'avérer juste, elle peut tout autant, du moins en théorie, être fausse.

Il peut être utile de se pencher sur deux affaires dans lesquelles on a soutenu qu'une sentence arbitrale était nulle, à savoir l'affaire *Orinoco Steamship Co.* et l'affaire de la *Sentence arbitrale rendue par le roi d'Espagne le 23 décembre 1906*.

Dans l'affaire de l'*Orinoco Steamship Co.*, la Cour permanente d'arbitrage a fait valoir que « l'appréciation des faits et l'interprétation des textes relevaient de la compétence de l'arbitre » et que

> « ses décisions, lorsqu'elles s'appuient sur une telle interprétation, ne sauraient être contestées par ce tribunal, dont le devoir est non de dire si l'affaire a été bien ou mal jugée, mais si la sentence doit être annulée ; que si une décision arbitrale pouvait être contestée sous prétexte d'appréciation erronée, l'appel et la revision, que les conventions de La Haye de 1899 et 1907 voulaient précisément éviter, deviendraient la règle générale » (*Recueil de la Cour de La Haye,* publié sous la direction de J. B. Scott, 1916, p. 231).

Ces observations, notamment celle selon laquelle « l'appréciation des faits et l'interprétation des textes » relèvent « de la compétence de l'arbitre », avaient trait à des décisions prises par lui sur le fond de l'affaire, et non à des décisions prises par lui dans l'exercice de la compétence de la

compétence, the point being that a challenge of nullity against a decision of the latter kind does not entitle the reviewing forum to revise the Tribunal's appreciation of the facts and documents leading to its decision on the merits. As to decisions made in exercise of *la compétence de la compétence* (relating in the particular case to a duty under the *compromis* to apply absolute equity), it would seem that the Permanent Court of Arbitration proceeded directly to consider whether the decision made by the umpire as to his powers, or the way they should be exercised, was correct.

The decision of this Court in the case concerning the *King of Spain's Award* likewise did point out "that the Award is not subject to appeal and that the Court cannot approach the consideration of the objections raised by Nicaragua to the validity of the Award as a Court of Appeal" (*I.C.J. Reports 1960*, p. 214, and paragraph 25 of the Judgment in this case). However, it is difficult to see this consideration at work when the Court came to deal with what appeared to be a challenge to an exercise of the arbitrator's *compétence de la compétence*. The Court did dispose of one branch of the arguments by taking the view that certain possible interpretations of the articles of the Gámez-Bonilla Treaty relating to the procedure for appointing the arbitrator were interpretations which could have been placed on those provisions in exercise of the power of the two national arbitrators to interpret them; but this concerned the constituent "power of the [two national] arbitrators to interpret and apply the articles in question in order to discharge their function of organizing the arbitral tribunal" (*ibid.*, p. 206), and not the functions of the tribunal after it had been set up. As regards these functions, one question which did arise was whether the adjudicating arbitrator misconstrued the *compromis* in assuming that it gave him power to grant compensations in order to establish a well-defined natural boundary line. It does not appear that the Court approached the problem on the basis that the only question before it was whether the interpretation made by the arbitrator was one which could have been made by him without manifest breach of competence; it determined that the interpretation made by him was in fact correct, and it did so after carrying out its own "examination of the Treaty" and making its own interpretation (*ibid.*, p. 215). My understanding is that when the Court said that it was not a Court of Appeal and added that it "is not called upon to pronounce on whether the arbitrator's decision was right or wrong" (*ibid.*, p. 214), the decision of the arbitrator to which it was there referring was his decision on the merits of the case, not his decision interpreting the *compromis* as to his powers when dealing with the merits. As mentioned above, my impression is similar as regards the corresponding remark by the Permanent Court of Arbitration in the *Orinoco Steamship Co.* case.

In both of the two cases mentioned, the references by the reviewing forum to the distinction between appeal and nullity seemed intended by it as a reminder to itself that in a case of nullity it should not stray into a re-assessment of the merits of the decision being challenged, the only issue before it being whether the decision resulted from a valid exercise of

compétence, l'idée étant qu'un recours en nullité contre une décision de ce genre n'autorise pas l'instance devant laquelle le recours est porté à contrôler l'appréciation par le tribunal des faits et des documents donnant lieu à la décision dudit tribunal au fond. Quant aux décisions prises dans l'exercice de la compétence de la compétence (concernant, en cette instance, l'obligation en vertu du compromis d'être d'une équité absolue), il semblerait que la Cour permanente d'arbitrage ait examiné directement la question de savoir si la décision prise par l'arbitre quant à ses pouvoirs, ou à la façon de les exercer, était correcte.

La décision prise par la Cour en l'affaire de la *Sentence arbitrale rendue par le roi d'Espagne* fait valoir de même que « la sentence n'étant pas susceptible d'appel, elle [la Cour] ne peut entreprendre l'examen des objections soulevées par le Nicaragua à la validité de la sentence comme le ferait une cour d'appel » (*C.I.J. Recueil 1960*, p. 214, et paragraphe 25 de l'arrêt en la présente instance). Cependant, il est difficile de voir où intervient cette considération lorsque la Cour en vient à traiter de ce qui semble être une contestation de l'exercice de la compétence de la compétence de l'arbitre. La Cour a réglé un élément de l'argumentation en estimant que certaines interprétations possibles des articles du traité Gámez-Bonilla concernant la procédure de nomination de l'arbitre étaient des interprétations que l'on aurait pu retenir de ces dispositions dans l'exercice du pouvoir des deux arbitres nationaux de les interpréter; mais cela concernait le pouvoir constitutif qu'avaient les deux arbitres « d'interpréter et d'appliquer les articles en question en vue de s'acquitter de leur tâche d'organisation du tribunal arbitral » (*ibid.*, p. 206), et non les fonctions du tribunal une fois celui-ci créé. En ce qui concerne ces fonctions, il est une question qui a été soulevée : celle de savoir si l'arbitre avait mal interprété le compromis en supposant que celui-ci lui conférait le pouvoir d'accorder des compensations pour établir une frontière naturelle bien déterminée. Il ne semble pas que la Cour ait abordé le problème en se disant que la seule question dont elle était saisie était de savoir si l'interprétation faite par l'arbitre était une interprétation qui pouvait être adoptée sans méconnaissance manifeste de la compétence; la Cour a déterminé que cette interprétation était en fait la bonne, et elle l'a fait après avoir procédé à son propre « examen du traité » et donné sa propre interprétation (*ibid.*, p. 215). Selon moi, lorsque la Cour insiste qu'elle n'est pas une cour d'appel et qu'elle « n'est pas appelée à dire si l'arbitre a bien ou mal jugé » (*ibid.*, p. 214), la décision de l'arbitre à laquelle se réfère la Cour est sa décision sur le fond de l'affaire, et non sa décision interprétant le compromis sur la question de ses pouvoirs sur le fond. Comme je l'ai dit plus haut, j'ai la même impression en ce qui concerne la remarque correspondante de la Cour permanente d'arbitrage dans l'affaire *Orinoco Steamship Co.*

Dans ces deux affaires, si l'instance saisie évoque la distinction entre appel et recours en nullité, c'est apparemment pour ne pas perdre de vue que dans le cadre d'un recours en nullité elle ne saurait ête amenée à réexaminer le fond de la décision contestée, la seule question qu'elle doit examiner étant celle de savoir si la décision résulte de l'exercice valide du

adjudicating power, not whether, if it did, it was correct on the merits. Without dogmatically excluding the possibility of other interpretations, I do not understand either of the two cases to be suggesting that, where a case of nullity is based on a challenge to the correctness of an interpretation made by the tribunal of the *compromis* concerning its powers, the reviewing forum is confined to asking merely whether the interpretation made by the tribunal was one which could have been made by it without manifest breach of its competence and is excluded from pronouncing on the correctness of the interpretation where this is held to be one which could have been so made. In the exercise of such powers of adjudication as it may in fact have, a tribunal undeniably has powers of appreciation over the factual and documentary material laid before it for evaluation and decision. So also, to some extent, where the competence of the tribunal depends on its appreciation of some matter in its relationship to the jurisdictional provisions of the *compromis* (*Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16*, pp. 19-22; and J. L. Simpson and Hazel Fox, *International Arbitration, Law and Practice*, 1959, p. 252). But such powers of appreciation are of a significantly different order from powers of appreciation as to what powers of adjudication are in the first instance conferred on the tribunal by the *compromis* itself.

For practical purposes, the difference between the Court's view and that offered here may well be one of approach, rather than one of result. But perhaps some importance may be attached to the approach. I agree with the view, underlying the Court's decision, that its authority to review the Tribunal's interpretation of the *compromis* is limited, but I differ as to the basis of the limitation. I regard the limitation not as one which in principle precludes the Court from pronouncing on the correctness of the Tribunal's interpretation, but as one which requires a certain measure of caution on the part of the Court when so pronouncing: I would link the limitation directly and firmly to considerations of stability of the arbitral process with respect to finality of awards, and to the consequential need for the Court to observe appropriate standards of cogency in determining whether its own interpretation of the *compromis* is so convincingly clear as to warrant displacement of the Tribunal's, should the two be different. I believe this view conforms to the tendency of such jurisprudence as there is on the point. I do not see the limitation as being linked to any idea that, as seems implied by paragraphs 47 and 60 of the Judgment of the Court, because these are not appeal proceedings, the Tribunal should be regarded by the Court as having an unreviewable freedom to select any of a number of possibly different interpretations of the *compromis* as to the substance of its mission, provided they are interpretations which could be made "without manifest breach of its competence".

With respect, then, I am not persuaded that it is a satisfactory approach to a challenge of nullity to seek to determine it by merely asking whether

pouvoir de statuer du tribunal et non, dans l'affirmative, celle de savoir s'il avait raison sur le fond. Sans vouloir exclure de manière dogmatique la possibilité d'autres interprétations, je ne vois dans aucune de ces affaires l'idée que, lorsqu'un recours en nullité s'appuie sur la contestation de la validité de l'interprétation faite par le tribunal du compromis en tant que source de ses pouvoirs, l'instance saisie de cette affaire doit se borner à se demander si l'interprétation faite par le tribunal était une interprétation qu'il pouvait retenir sans méconnaître manifestement sa compétence et ne pourrait se prononcer sur le bien-fondé ou non de l'interprétation dans le cas où l'interprétation en question remplit cette condition. Dans l'exercice des pouvoirs juridictionnels qu'il peut avoir, un tribunal a manifestement des pouvoirs d'appréciation des éléments factuels et documentaires dont il est saisi pour évaluation et décision. Il en va de même, dans une certaine mesure, lorsque la compétence d'un tribunal dépend de son appréciation d'une question devant être replacée dans le contexte des dispositions juridictionnelles du compromis (*Interprétation de l'accord gréco-turc du 1^er^ décembre 1926 (protocole final, article IV), avis consultatif, 1928, C.P.J.I. série B nº 16*, p. 19-22, et J. L. Simpson et Hazel Fox, *International Arbitration, Law and Practice*, 1959, p. 252). Mais de tels pouvoirs d'appréciation sont de nature sensiblement différente de celle des pouvoirs d'appréciation concernant les pouvoirs juridictionnels que le compromis lui-même confère directement au tribunal.

Il se peut fort bien que, dans la pratique, la différence entre l'opinion de la Cour et celle exposée ici soit une différence d'approche plutôt que de résultat. Mais il faut peut-être attacher une certaine importance à l'approche. Je souscris à l'avis qui sous-tend la décision de la Cour, à savoir que le pouvoir qu'elle a de revoir l'interprétation du compromis est limité, mais je ne partage pas son point de vue sur le fondement de ces limites. Pour moi, ces limites n'empêchent pas la Cour, en principe, de se prononcer sur la justesse de l'interprétation du Tribunal, mais exigent simplement que la Cour fasse preuve d'une certaine prudence en se prononçant sur cette question : j'associerais directement et fermement ces limites à des considérations relatives à la sécurité du processus arbitral quant au caractère définitif des sentences, et à la nécessité, qui en est le corollaire logique, pour la Cour de suffisamment bien fonder la décision par laquelle elle déterminerait si sa propre interprétation du compromis a une clarté si éclatante qu'elle doit supplanter celle du Tribunal, à supposer que les deux diffèrent. Je pense que ce point de vue s'aligne sur l'orientation de la jurisprudence qui existe sur ce sujet. Je ne vois aucune relation entre ces limites et l'idée, qui pourrait être implicite aux paragraphes 47 et 60 de l'arrêt de la Cour, que, du fait qu'il ne s'agit pas d'un appel, la Cour devrait estimer que le Tribunal est entièrement libre de choisir parmi les différentes interprétations possibles du compromis concernant l'essentiel de sa mission, à condition qu'il s'agisse d'interprétations ne « méconnaissant manifestement pas sa compétence ».

Je ne suis donc pas convaincu qu'il soit satisfaisant, lors d'un recours en nullité, de chercher à trancher la question en demandant simplement si

the tribunal's interpretation of the *compromis* as to its powers was one which could have been made without manifest breach of its competence. More particularly, I consider that there was nothing in law to prevent the Court from pronouncing on the issue whether the Tribunal in this case was correct in interpreting the Arbitration Agreement to mean that it was not called upon to reply to the second question put to it.

II. WHETHER THE TRIBUNAL WAS CORRECT IN INTERPRETING THE *COMPROMIS* TO MEAN THAT IT WAS NOT CALLED UPON TO ANSWER THE SECOND QUESTION

I am of opinion that the Tribunal was correct in interpreting the *compromis* to mean that it was not called upon to reply to the second question.

Guinea-Bissau's contention that recourse should have been had to the second question is based on its argument that the overriding object and purpose of the Arbitration Agreement, particularly as suggested by the Preamble, was that there should in any event be a delimitation by a single line of all the maritime spaces of the Parties which were the subject of the dispute between them. This was the premise on which learned counsel for Guinea-Bissau put its case when he said:

> "the first and second questions asked in Article 2 were the parts of an overall question: what is the maritime boundary, namely the boundary of all the maritime spaces? If it derived from the exchange of letters, the reply to the overall question would stem from that to the first question; otherwise, it would stem from the reply to the second." (Public sitting of 9 April 1991 (afternoon), CR 91/7, p. 58, Professor Galvão Teles.)

This interpretation of the two questions, founded on the desideratum of a comprehensive delimitation, is attractive; some support for it may indeed be claimed from the jurisprudence which, in several well-known cases, warns of the limitations of a narrow grammatical approach which, by inhibiting the Court from ascertaining what the parties really did mean when they used the words falling to be construed, could result in the defeat of the true object and purpose of a treaty.

But, taking full account of the flexibility of that jurisprudence, is Guinea-Bissau's reading of the two questions reasonably reconcilable with their actual formulation? Without any necessity to call upon the *travaux préparatoires*, I would grant that the Arbitration Agreement itself does indicate a general desire of the Parties for a comprehensive settlement of their dispute. Yet, it appears to me that the operative provisions of the Agreement demonstrate a specific intention not fully congruent with that general desire, in the sense that the intention, as so demonstrated, was indeed to realize that desire, and to realize it through the arbitration provided for, but only subject to a condition precedent which, as it turned out,

l'interprétation du compromis retenue par le Tribunal quant à ses pouvoirs était une interprétation qu'il pouvait faire sienne sans qu'il y ait méconnaissance manifeste de sa compétence. Plus particulièrement, j'estime que rien, en droit, n'empêchait la Cour de trancher la question de savoir si le Tribunal, en l'occurrence, pouvait légitimement interpréter le compromis d'arbitrage dans le sens qu'il n'était pas tenu de répondre à la seconde question qui lui était posée.

II. LE TRIBUNAL A-T-IL EU RAISON D'INTERPRÉTER LE COMPROMIS DANS LE SENS QUE LA SECONDE QUESTION N'APPELAIT PAS DE RÉPONSE DE SA PART ?

J'estime que le Tribunal a eu raison d'interpréter le compromis comme signifiant que la seconde question n'appelait pas de réponse de sa part.

L'allégation de la Guinée-Bissau qu'il fallait répondre à la seconde question s'appuie sur son argument selon lequel le but et l'objet primordiaux du compromis d'arbitrage, tels que le laisse entendre notamment le préambule, étaient qu'il devait en tout état de cause y avoir une délimitation globale, par une ligne unique, de tous les espaces maritimes constituant l'objet du différend entre les Parties. C'est sur cette prémisse que le conseil de la Guinée-Bissau a basé son argumentation :

> « la première et la deuxième question posées à l'article 2 étaient les parties d'une question globale : quelle est la frontière maritime, c'est-à-dire la frontière de tous les espaces marins ? Si elle provenait de l'échange de lettres, la réponse à la question globale découlerait de celle à la première question ; sinon, elle découlerait de la réponse à la deuxième. » (Audience publique du 9 avril 1991, après-midi, CR 91/7, p. 58, M. Galvão Teles.)

Cette interprétation des deux questions, fondée sur le désir de parvenir à une délimitation globale, est certes séduisante et la jurisprudence permet jusqu'à un certain point de la défendre : en effet, dans plusieurs affaires bien connues, elle met en garde contre les restrictions que représente une approche étroitement grammaticale qui, en interdisant à la Cour de déterminer ce que les parties entendaient réellement par les mots retenus, pourrait faire échouer l'objet et le but véritables d'un traité.

Mais, malgré toute la souplesse qu'offre cette jurisprudence, l'interprétation que fait la Guinée-Bissau de ces deux questions est-elle raisonnablement compatible avec leur libellé exact ? Sans qu'il soit en aucune façon nécessaire de se référer aux travaux préparatoires, je ne disconviens pas que le compromis d'arbitrage lui-même témoigne du désir général des Parties de voir régler leur différend de manière globale. Toutefois, il me semble que le dispositif du compromis reflète une intention spécifique qui n'est pas totalement compatible avec ce désir général, en ceci que l'intention dont il est témoigné était certes de réaliser le désir des Parties, et de le réaliser par le biais de l'arbitrage prévu, mais seulement sous réserve d'une

was not satisfied. It is this partial discrepancy between apparent wish and specific machinery which constitutes the special legal problem in this case. How is the problem to be resolved?

The key provisions of the Arbitration Agreement, as set out in Article 2, put two questions to the Tribunal, stated in such a way as to make it clear that, while the first question had to be answered in any event, the second had to be answered only "[i]n the event of a negative answer to the first question . . .". Thus, the very structure of the provision contemplated the distinct possibility that only the first of the two questions might require to be answered. This being so, to make good the argument that the Tribunal was obliged to produce a comprehensive delimitation in any event, it would have to be shown that the Tribunal was both competent and bound to produce such a delimitation by way of answer to the first question if, for any reason, that question alone fell to be answered. However, it seems clear (and this aspect is revisited below) that a comprehensive delimitation could in no circumstances be produced by way of answer to the first question. It being also clear that that question could nevertheless be the only question requiring to be answered, it follows that the argument that the Tribunal was obliged in any event to produce a comprehensive delimitation fails. With that failure, the conceptual foundation of Guinea-Bissau's case is removed. And the case ends.

What, however, is the position if this conclusion is wrong? As has been seen, Guinea-Bissau's argument was this — that a comprehensive delimitation was necessary in any event, and that, accordingly, if the answer of the Tribunal to the first question did not in fact produce such a delimitation, it was necessary to pass to the second question in search of one. This argument might seem to imply that Guinea-Bissau was taking the position that the first question did embrace the possibility of establishing a comprehensive delimitation under it. However, it has to be recalled that, in the arbitral proceedings, Guinea-Bissau resisted, and successfully resisted, a contention by Senegal that an answer to the first question, upholding the 1960 Agreement, could produce a comprehensive delimitation. Senegal, for its part, accepted the Tribunal's decision on this point. Before this Court neither side took the position that it was possible, even theoretically, for a comprehensive delimitation of any kind to be produced by any conceivable answer to the issue raised in that question as to whether the 1960 Agreement had the force of law in the relations between the Parties. That question was simply not directed to the establishment of a comprehensive delimitation of any kind. Thus, although it is perfectly true, as repeatedly emphasized by Guinea-Bissau, that the Tribunal's answer to the first question did not in fact produce a comprehensive delimitation, there is no point in saying so if, to begin with, that question was not directed to the establishment of any such delimitation. There would be no point in saying so because the statement would be based on a non-existent premise. Accordingly, the fact that no such delimitation was effected

condition préalable qui, en l'occurrence, n'a pas été satisfaite. C'est ce décalage partiel entre le souhait apparent et le mécanisme spécifique qui constitue la spécificité du problème juridique en cause. Comment le résoudre?

Les dispositions clés du compromis d'arbitrage, figurant à l'article 2, posent deux questions au Tribunal, formulées de façon à indiquer clairement que si, en toute circonstance, le Tribunal est tenu de répondre à la première question, il a à répondre à la seconde question seulement «en cas de réponse négative à la première question...» Ainsi, la structure même de cette disposition envisageait la possibilité que seule la première des deux questions puisse exiger une réponse. Cela étant, pour montrer que le Tribunal était tenu de procéder à une délimitation globale quelles que soient les circonstances, il faudrait démontrer que le Tribunal était à la fois compétent pour procéder à cette délimitation et tenu de le faire en réponse à la première question si, pour une raison quelconque, il était répondu uniquement à cette question. Cependant, il semble clair (et nous reviendrons sur ce point plus loin) qu'une délimitation globale ne pouvait en aucun cas constituer une réponse à la première question. Comme il est clair aussi que la première question pouvait bien être la seule appelant une réponse, il s'ensuit que, par la force des choses, l'argument selon lequel le Tribunal était tenu, en toutes circonstances, de procéder à une délimitation globale est mis en échec. Avec cet échec, le fondement conceptuel de l'argumentation présentée par la Guinée-Bissau disparaît, et c'est la fin de l'affaire.

Mais que se passe-t-il si cette conclusion est fausse? Comme nous l'avons vu, l'argument de la Guinée-Bissau était qu'une délimitation globale s'imposait quelles que soient les circonstances et que, si la réponse donnée par le Tribunal à la première question n'aboutissait pas à cette délimitation, il fallait donc à cette fin passer à la seconde. Ce raisonnement semblerait impliquer que la Guinée-Bissau était d'avis que la première question renfermait la possibilité de procéder à une délimitation globale. Il convient de rappeler cependant que, pendant la procédure arbitrale, ce pays s'est opposé, avec succès, à l'affirmation du Sénégal selon laquelle une réponse affirmative à la première question confirmant la validité de l'accord de 1960 pourrait donner lieu à une délimitation globale. Le Sénégal, pour sa part, a accepté la décision du Tribunal sur ce point. Devant la Cour, aucune des Parties n'a soutenu qu'il était possible, ne serait-ce que sur le plan théorique, d'aboutir à une délimitation globale d'aucune sorte en vertu d'une réponse, quelle qu'elle fût, au point soulevé par cette question, à savoir si l'accord de 1960 faisait droit dans les relations entre les Parties. En effet, la première question ne visait tout simplement pas une délimitation globale. Ainsi, encore qu'il soit parfaitement vrai, comme l'a fait valoir à maintes reprises la Guinée-Bissau, que la réponse du Tribunal à la première question n'a effectivement pas débouché sur une délimitation globale, il est inutile de le dire si, dès le départ, cette question n'avait pas comme objet cette délimitation globale. Il serait inutile de le dire puisque cette affirmation reposerait sur une prémisse inexistante. En conséquence, le fait qu'aucune délimitation ne

under the first question did not in logic provide a reason for having recourse to the second question.

It may be argued that, although, for the reasons given by the Tribunal, the 1960 line could not constitute a comprehensive delimitation, this did not mean that the first question could not be construed as asking the Tribunal to say whether that line, if upheld, constituted such a delimitation, and that the answer which the Tribunal gave amounted to a partially negative answer to the question thus understood. It is difficult, however, to discover in the wording of the question the ingredients of such a construction. A possible argument is that the reference in the question to "the relations" between the Parties was a reference to their relations in respect of the boundary throughout all of the existing maritime spaces, and not merely those maritime spaces which existed in 1960, with the result that the Tribunal, if it upheld the 1960 Agreement, would be required to consider whether the Agreement governed all of their relations in this comprehensive sense. My difficulty with the argument is that it seems necessary to distinguish "the relations" between the Parties from the subject-matter of the relations. The word "relations" by itself means the "various modes in which one country, state, etc., is brought into contact with another by political or commercial interests" (*The Shorter Oxford English Dictionary*, 3rd ed., 1984, p. 1796), or "the connections between . . . nations" (*Webster's New Dictionary and Thesaurus, Concise Edition*, 1990, p. 459). It appears to me that these "connections" may concern a variety of interests and that a reference to the former does not by itself suffice to identify the latter. Accordingly, the reference in the first question to "the relations" between the Parties does not by itself identify the particular maritime spaces which those relations concern. These are to be collected from the reference in the question to the 1960 Agreement, which of course concerned only some of the existing maritime spaces of the Parties. In effect, in asking whether the 1960 Agreement had the force of law in the relations between the Parties, the first question was asking whether the Agreement had such force as regards the boundary delimiting the maritime spaces referred to in the Agreement, and not also as regards maritime spaces not therein referred to. There is nothing in the question which supports the view that it was asking the Tribunal to say whether the 1960 line, if upheld, was to have an extended application throughout all of the existing maritime spaces of the Parties.

It may be said that this conclusion does not represent the Tribunal's own interpretation of the first question. Having held that the 1960 Agreement had the force of law in the relations between the Parties, the Tribunal passed on to consider the spatial application of the Agreement. Senegal had contended that, by reason of certain factors, the line laid down by the 1960 Agreement applied to all of the maritime spaces of the Parties as now known to international law, and was accordingly no longer restricted to the spaces specified in the Agreement itself. Speaking in this connection, the Tribunal said:

soit intervenue en vertu de la première question ne constituait pas, d'un point de vue logique, une raison de recourir à la seconde.

On peut soutenir qu'alors même que, pour les raisons indiquées par le Tribunal, la ligne de 1960 ne pouvait pas constituer une délimitation globale, cela ne signifiait pas que la première question ne puisse être interprétée comme demandant au Tribunal de dire si cette ligne, à supposer qu'elle soit confirmée, constituait une telle délimitation, ni que la réponse du Tribunal constituait une réponse partiellement négative à la question ainsi comprise. Toutefois, il est difficile de déceler dans le libellé de la question les éléments d'une telle interprétation. Un argument possible est que la référence faite dans la question aux «relations» entre les Parties était une référence à leurs relations au regard de la frontière départageant tous les espaces maritimes existants, et non seulement les espaces maritimes qui existaient en 1960. Le résultat serait que le Tribunal, s'il confirmait la validité de l'accord de 1960, serait tenu de se demander si le compromis régissait globalement toutes leurs relations. Selon moi, la difficulté que suscite cet argument est qu'il paraît nécessaire d'établir une distinction entre «les relations» entre les Parties et le contenu desdites relations. Le mot «relations» est défini comme suit: «les divers modes par lesquels un pays, un Etat, etc., est en contact avec un autre par des intérêts politiques ou commerciaux» (*The Shorter Oxford English Dictionary*, 3^e^ éd., 1984, p. 1796), et: «les rapports entre ... nations» (*Webster's New Dictionary and Thesaurus, Concise Edition*, 1990, p. 459). Il me semble que ces «rapports» peuvent concerner des intérêts fort divers et qu'une référence aux premiers ne suffit pas à identifier les seconds. De ce fait, la référence, à la première question, aux «relations» entre les Parties ne permet pas, en soi, d'identifier les espaces maritimes spécifiques constituant l'objet de ces relations. Ceux-ci doivent se déduire de la référence faite à cette question dans l'accord de 1960, qui ne concernait évidemment que certains des espaces maritimes des Parties. En effet, en demandant si l'accord de 1960 faisait droit dans les relations entre les Parties, la première question tendait en fait à savoir si l'accord faisait droit en ce qui concerne la frontière délimitant les espaces maritimes visés dans l'accord, et pas en ce qui concerne aussi les espaces maritimes qui n'y étaient pas mentionnés. Rien dans la question ne vient étayer le point de vue selon lequel la question demandait au Tribunal de dire si la délimitation de 1960, à supposer qu'elle soit maintenue, devait être élargie pour englober l'ensemble des espaces maritimes existants des Parties.

On peut soutenir que cette conclusion ne représente pas l'interprétation faite par le Tribunal de la première question. Ayant considéré que l'accord de 1960 faisait droit dans les relations entre les Parties, le Tribunal s'est ensuite penché sur l'application spatiale de l'accord. Le Sénégal avait soutenu que, en raison de certains facteurs, la ligne tracée par l'accord de 1960 s'appliquait à tous les espaces maritimes que connaît à l'heure actuelle le droit international, et n'était par conséquent plus limitée aux espaces mentionnés dans l'accord lui-même. A ce propos, le Tribunal dit ceci:

> "The Tribunal is not attempting to determine at this point whether there exists a delimitation of the exclusive economic zones based on a legal norm other than the 1960 Agreement, such as a tacit agreement, a bilateral custom or a general norm. It is merely seeking to determine whether the Agreement in itself can be interpreted so as to cover the delimitation of the whole body of maritime areas existing at present." (Award, para. 83.)

Do these remarks mean that the Tribunal understood the first question to be asking it to say whether the delimitation effected by the 1960 Agreement, if upheld, governed all of the maritime areas existing at present? If so, the answer which it gave — that the Agreement applied only to the territorial sea, the contiguous zone and the continental shelf — may well be regarded as a negative answer to the first question and as therefore requiring recourse to the second.

However, reading the quoted statement in context, I do not think it shows that the Tribunal understood the first question to be asking it to say whether the 1960 line applied comprehensively. In response to Senegal's contention, the Tribunal carefully differentiated between the delimitation effected by the 1960 Agreement itself and any possible additional delimitation subsequently effected on the basis of "a legal norm other than the 1960 Agreement, such as a tacit agreement, a bilateral custom or a general norm". The Tribunal held that the first question was confined to the 1960 delimitation and raised no issue about any other possible delimitation. Consequently, the Tribunal was concerned under the first question only with the spatial application of the delimitation effected by the 1960 Agreement itself, and not also with the spatial application of any possible additional delimitation subsequently effected on a basis other than that Agreement. It was precisely because the Tribunal understood the first question in this limited way that it rejected Senegal's contention that the 1960 Agreement applied to all existing maritime spaces. That was a negative answer to a question raised by Senegal; it was not a negative answer to the first question presented by the Arbitration Agreement.

Nor could the Tribunal's answer be regarded as a partial answer to the first question. The non-applicability of the 1960 Agreement to maritime spaces not referred to in it does not mean that the Agreement was not wholly in force. How far the Agreement had the force of law in the relations between the Parties was to be measured by reference to the maritime spaces to which it referred, not by reference to maritime spaces to which it did not refer. The Agreement was in force between the Parties to the entire extent visualized by its own terms; it was fully in force.

There could be argument — and such argument was in fact advanced by Senegal — that the Tribunal's task was merely to say whether the

> « Le Tribunal ne cherche pas ici s'il existe une délimitation des zones économiques exclusives fondée sur une norme juridique autre que l'accord de 1960, telle qu'un accord tacite, une coutume bilatérale ou une norme générale. Il cherche seulement à voir si l'accord, en lui-même, peut être interprété de manière à englober la délimitation de l'ensemble des espaces maritimes actuellement existants. » (Sentence, par. 83.)

Ces remarques signifient-elles que, pour le Tribunal, la première question cherchait en fait à savoir si la délimitation effectuée par l'accord de 1960, au cas où sa validité serait confirmée, régissait l'ensemble des espaces maritimes actuellement existants? Dans l'affirmative, la réponse qu'il a donnée — à savoir que l'accord ne concernait que la mer territoriale, la zone contiguë et le plateau continental — peut fort bien être perçue comme une réponse négative à la première question, appelant par conséquent une réponse à la seconde.

Cependant, si l'on replace cette citation dans son contexte, je ne pense pas qu'elle démontre que le Tribunal a compris que par la première question on lui demandait de dire si la frontière de 1960 s'appliquait de manière globale. En réponse à l'argumentation du Sénégal, le Tribunal a bien veillé à établir une distinction entre la délimitation effectuée par l'accord de 1960 lui-même et toute autre délimitation ultérieure fondée « sur une norme juridique autre que l'accord de 1960, telle qu'un accord tacite, une coutume bilatérale ou une norme générale ». Le Tribunal a considéré que la première question avait trait uniquement à la délimitation de 1960 et ne conduisait pas à s'interroger sur toute autre délimitation possible. Par conséquent, le Tribunal, dans le cadre de la première question, ne s'est intéressé qu'à l'application spatiale de la délimitation opérée par l'accord de 1960 lui-même, et non à l'application spatiale d'une autre délimitation pouvant intervenir par la suite sur une base autre que cet accord. C'est précisément parce que le Tribunal a interprété la première question de cette manière restrictive qu'il a rejeté l'affirmation du Sénégal que l'accord de 1960 s'appliquait à tous les espaces maritimes existants. C'était là une réponse négative à une question posée par le Sénégal, et non une réponse négative à la première question figurant dans le compromis d'arbitrage.

La réponse du Tribunal ne peut pas être considérée non plus comme une réponse partielle à la première question. Le fait que l'accord de 1960 ne s'appliquait pas aux espaces maritimes qui n'y étaient pas visés ne signifie pas que l'accord ne faisait pas pleinement droit. Pour déterminer dans quelle mesure l'accord faisait droit dans les relations entre les Parties, il fallait se référer aux espaces maritimes qui y étaient mentionnés, et non à ceux qui n'y étaient pas visés. L'accord faisait droit entre les Parties dans toute la mesure envisagée par ses termes mêmes; autrement dit, il faisait pleinement droit.

On pourrait prétendre — et cet argument a en fait été avancé par le Sénégal — que la tâche du Tribunal se bornait à dire si l'accord de 1960

1960 Agreement had the force of law "in the relations between the" Parties, and that it was not required to determine the field of application of the Agreement, if upheld. I do not pursue that question, because even if the Tribunal was so required, the answer which it gave, both as to the applicability and the scope of the Agreement, could not, in my opinion, be regarded as a negative answer so as to require recourse to the second question.

For the reasons given, it appears to me that the two questions were not directed to the achievement of the same thing. They were both concerned with the same general subject, but they were addressed to different aspects of it. I agree with the Court that the first question was concerned with the issue whether the 1960 Agreement had the force of law in the relations between the Parties, while the second was directed to the making of a maritime delimitation in the event that the Agreement did not have such force. The Tribunal was indeed required to undertake a delimitation of all the maritime areas of the Parties, but only on condition that it first found that the 1960 Agreement did not have the force of law in the relations between them. As this condition — a condition precedent — was not satisfied, the duty to undertake such a delimitation was never triggered off. To hold otherwise is effectively to say that the Tribunal was bound to answer the second question whatever was its answer to the first — a proposition needing only to be stated to be dismissed.

It may be said that there is little to recommend a method of interpretation which is so strict as to lead to a construction of the Arbitration Agreement "according to which it would . . . fail entirely to enunciate the question really in dispute . . ." (see remarks of the Permanent Court of International Justice in the *Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series A/B, No. 46*, p. 96, at p. 139). Since the actual dispute between the Parties in this case extended to all of their existing maritime spaces, it may be contended that any interpretation which excluded the possibility of a comprehensive settlement through recourse to the second question is an interpretation which fails to enunciate the question really in dispute. On the other hand, to require recourse to be had to the second question notwithstanding the Tribunal's affirmative answer to the first is so palpable a disregard of the preclusive words with which the second question begins as to invite attention to other applicable considerations.

In his earlier capacity as a Member of this Court, Judge André Gros, one of the two arbitrators who voted for the Award, had occasion, first in 1974 and then again in 1984, to refer to the following passage from Charles De Visscher (*Problèmes d'interprétation judiciaire en droit international public*, 1963, at pp. 24 and 25):

> "The function of interpretation is not to perfect a legal instrument with a view to adapting it more or less precisely to what one may be tempted to envisage as the full realisation of an objective which was logically postulated, but to shed light on what was in fact the will of the Parties." (*Fisheries Jurisdiction (United Kingdom* v. *Iceland),*

faisait droit « dans les relations entre les Parties », et qu'il n'était pas tenu de déterminer le champ d'application de l'accord, si la validité de celui-ci était confirmée. Je ne m'arrête pas sur cette question, car même à supposer que le Tribunal eût été tenu de le faire, la réponse qu'il a donnée, en ce qui concerne tant l'applicabilité que la portée de l'accord, ne pouvait, à mon avis, être considérée comme une réponse négative qui exigerait de recourir à la seconde question.

Pour toutes ces raisons, il me semble que les deux questions ne visaient pas la même chose. Les deux portaient sur le même sujet général, qu'elles abordaient cependant sous des aspects différents. Je conviens avec la Cour que la première question avait trait à la question de savoir si l'accord de 1960 faisait droit dans les relations entre les Parties, alors que la seconde avait pour objet de tracer une délimitation maritime au cas où l'accord ne ferait pas droit. Le Tribunal était en effet tenu de procéder à une délimitation de tous les espaces maritimes des Parties, mais seulement à la condition de décider dans un premier temps que l'accord de 1960 ne faisait pas droit dans les relations entre les Parties. Comme cette condition — condition préalable — n'était pas remplie, l'obligation de procéder à la délimitation n'est jamais intervenue. Prétendre autrement équivaut à dire que le Tribunal était tenu de répondre à la seconde question quelle que fût sa réponse à la première — affirmation qui tombe d'elle-même.

L'on peut dire qu'il est difficile de défendre une méthode d'interprétation à tel point rigoureuse qu'elle donnerait au compromis « un sens selon lequel ... il aurait entièrement omis de poser la véritable question litigieuse... » (voir les observations de la Cour permanente de Justice internationale dans l'affaire des *Zones franches de la Haute-Savoie et du Pays de Gex, C.P.J.I. série A/B nº 46*, p. 139). Comme le différend réel entre les Parties à cette instance s'étendait à tous leurs espaces maritimes existants, on peut faire valoir que toute interprétation qui excluait la possibilité d'un règlement global par le recours à la seconde question est une interprétation qui omet de poser la véritable question litigieuse. D'un autre côté, le fait d'obliger à recourir à la seconde question malgré la réponse affirmative du Tribunal à la première constitue un dédain tellement manifeste de l'exclusion inscrite dans la seconde question, qu'il y a lieu d'envisager d'appliquer d'autres considérations.

En sa qualité d'ancien membre de la Cour, M. André Gros, l'un des deux arbitres ayant voté en faveur de la sentence, a eu l'occasion, d'abord en 1974 puis de nouveau en 1984, de citer le passage suivant de Charles De Visscher (*Problèmes d'interprétation judiciaire en droit international public*, 1963, p. 24 et 25) :

> « La fonction de l'interprétation n'est pas de perfectionner un instrument juridique en vue de l'adapter plus ou moins exactement à ce que l'on peut être tenté d'envisager comme la pleine réalisation d'un objectif logiquement postulé, mais de faire la lumière sur ce que les Parties ont effectivement voulu. » (*Compétence en matière de*

> *I.C.J. Reports 1974*, dissenting opinion, p. 149; and, *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), I.C.J. Reports 1974*, dissenting opinion, pp. 238-239. See likewise the *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, dissenting opinion, p. 388, where the English translation is slightly different.)

Judge Anzilotti is on record as observing that, were the Permanent Court of International Justice to confine itself to answering only part of the question "which has been put to it", the Court would be committing "an abuse of its powers" (*Customs Régime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 41*, p. 37, at p. 69). However, to avoid a *petitio principii*, it must first be determined what is the question requiring to be answered (*Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series C, No. 58*, at pp. 445, 610-613, Professor Logoz, for Switzerland, *arguendo*). Thus, although a *compromis* may show that the parties desire an answer to all of certain questions, the way in which the questions are actually framed can conceivably prevent the tribunal from dealing with all of them. Treating of a case of this kind, in which it held that one of certain questions could not be answered because of the way it was constructed, the Permanent Court of International Justice seemed unmoved by the circumstance that the Court was expressly required by the *compromis* to answer all of the questions "by a single judgment". Nor did it yield to argument that —

> "the conclusion of the Special Agreement represented a compromise between the opposing views of the Parties — one of the two States being particularly interested in the legal question submitted to the Court in Article 1, and the other in the subjects dealt with in Article 2 — and that to give judgment only on the question of law submitted by Article 1 was unjust, as it destroyed the balance between the two Parties" (*Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 96, at p. 163).

That argument, it may be thought, carries a certain analogical force in this case. However, without entering into the reasons why it failed in that case, I take the view that it would fail equally in this case; reflections about possible difficulties created by the Award for the completion of a comprehensive delimitation, though deserving of consideration, are not decisive. Referring to the way the particular question had been formulated in the *Free Zones* case, the Permanent Court of International Justice said:

> "If the obstacle to fulfilling part of the mission which the Parties intended to submit to the Court results from the terms of the Special Agreement itself, it results directly from the will of the Parties . . ." *(Ibid.)*

pêcheries (Royaume-Uni c. Islande), C.I.J. Recueil 1974, opinion dissidente, p. 149, et *Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande), C.I.J. Recueil 1974,* opinion dissidente, p. 238-239; voir également *Délimitation de la frontière maritime dans la région du golfe du Maine, C.I.J. Recueil 1984,* opinion dissidente, p. 388.)

Comme l'a dit M. Anzilotti, la Cour permanente de Justice internationale, en se limitant à répondre à une partie seulement de la question « qui lui est posée », commettrait « un véritable abus de pouvoir » (*Régime douanier entre l'Allemagne et l'Autriche, avis consultatif, 1931, C.P.J.I. série A/B nº 41,* p. 69). Cependant, pour éviter la pétition de principe, il convient tout d'abord de déterminer quelle est la question qui appelle une réponse (*Zones franches de la Haute-Savoie et du Pays de Gex, C.P.J.I. série C nº 58,* p. 610-613, M. Logoz, pour la Suisse, *arguendo*). Ainsi, si un compromis peut témoigner du désir des parties d'avoir une réponse à la totalité de certaines questions, il est concevable que la façon dont ces questions sont formulées puisse empêcher le tribunal de répondre à toutes. Face à une affaire semblable, dans laquelle la Cour permanente de Justice internationale a considéré qu'il n'était pas possible de répondre à l'une des questions à cause de la façon dont elle était formulée, la Cour permanente s'est montrée insensible au fait que le compromis lui demandait expressément de répondre à toutes les questions « par une seule décision ». Elle n'a pas cédé non plus à l'argument selon lequel:

> « la conclusion du compromis représentait une transaction entre les points de vues opposés des Parties, l'un des deux Etats attachant un intérêt particulier à la question juridique soumise à la Cour par l'article premier, et l'autre s'intéressant spécialement aux questions dont traite l'article 2; par conséquent, si la Cour ne rendait son arrêt que sur la question de droit à elle soumise par l'article premier, il en résulterait une injustice, car l'équilibre entre les deux Parties serait détruit » (*Zones franches de la Haute-Savoie et du Pays de Gex, arrêt, 1932, C.P.J.I. série A/B nº 46,* p. 163).

Cet argument, pourrait-on penser, présente une certaine analogie avec la présente affaire. Cependant, sans entrer dans le détail des raisons pour lesquelles cet argument a échoué dans l'affaire en question, j'estime qu'il échouerait également en l'espèce; des réflexions sur les difficultés que la sentence risque de susciter lorsque l'on cherchera à procéder à une délimitation globale, tout en méritant de retenir l'attention, ne sont pas décisives. Evoquant la façon dont la question avait été formulée dans l'affaire des *Zones franches,* la Cour permanente de Justice internationale dit ceci:

> « Si l'obstacle qui s'oppose à l'accomplissement d'une partie de la mission que les Etats en cause entendaient confier à la Cour résulte des termes du compromis lui-même, c'est directement de la volonté des Parties que cet obstacle découle... » *(Ibid.)*

It seems to me that in the case at bar such an obstacle is presented by the will of the Parties themselves as expressed by them in the prefatory words of the second question. Moreover, those words having been introduced at the instance of Guinea-Bissau itself, there is a sense in which it is apposite to bear in mind that, as was once said by Judge Anzilotti, "it is only fair that a government should bear the consequences of the wording of a document for which it is responsible" (*Polish Agrarian Reform and German Minority, P.C.I.J., Series A/B, No. 58*, p. 175, dissenting opinion, at p. 182). The controlling words in this case are clear. Every effort to put a gloss on them founders on Professor Rolin's remark, "la Cour estimera sans doute qu'il faut lire ce qui est écrit" (*I.C.J. Pleadings, Anglo-Iranian Oil Co.*, p. 486).

The international arbitral process provides a useful procedure of peaceful settlement. The international community rightly values the process. Clearly, its utility must be protected against open-ended challenges to the finality of awards. Equally clearly, it would be misconceived to seek to protect the system by suffering any serious fault in its operation to remain remediless: the preservation of the system and the vindication of its credibility are interlinked. In my opinion, however, the complaint in this case has not been made out. True, the Award of the Tribunal did not result in a delimitation of all the maritime areas in dispute. However, this is a comment not on the Award, but on the way the Parties chose to frame the questions put to the Tribunal. As to why they framed the questions in the way they did, a court of law need not look beyond the words of Charles De Visscher:

> "Il n'est pas rare qu'il faille considérer comme adéquate une interprétation qui n'assigne au traité qu'une efficacité restreinte, à première vue peu conforme à ce qui, en bonne logique, pourrait apparaître comme son but. Cette inefficacité partielle peut s'expliquer, en fait, par la volonté réfléchie des contractants de ne pas s'engager au-delà d'un certain point." (De Visscher, *op. cit.*, p. 77.)

(Signed) Mohamed SHAHABUDDEEN.

Il me semble qu'en l'espèce cet obstacle est créé par la volonté des Parties elles-mêmes, telle qu'elles l'ont exprimée dans les premiers mots de la seconde question. En outre, ces mots ayant été introduits sur l'insistance de la Guinée-Bissau elle-même, il semblerait qu'il ne faille pas perdre de vue que, comme l'a dit naguère M. Anzilotti, « il n'est que juste que ce gouvernement supporte les conséquences de la rédaction peu claire d'un document qui émane de lui » (*Réforme agraire polonaise et minorité allemande, C.P.J.I. série A/B no 58*, opinion dissidente, p. 182). Les mots clés, en l'occurrence, sont clairs; tout effort pour les masquer se heurte aux mots de M. Rolin, « la Cour estimera sans doute qu'il faut lire ce qui est écrit » (*C.I.J. Mémoires, Anglo-Iranian Oil Co.*, p. 486).

L'arbitrage international est une utile procédure de règlement pacifique. La communauté internationale y attache de la valeur, à juste titre. De toute évidence, il ne faut pas que son utilité soit compromise par des contestations sans fin du caractère définitif des sentences. Tout aussi manifestement, il serait peu judicieux de chercher à protéger le système en acceptant de ne pas remédier, le cas échéant, à un grave défaut de son fonctionnement: la sauvegarde du système et sa crédibilité sont liées. A mon avis, cependant, le grief en la présente affaire n'a pas été établi. Certes, la sentence du Tribunal n'a pas abouti à une délimitation globale de tous les espaces maritimes en litige. Cela dit, ce reproche s'adresse non à la sentence, mais à la façon dont les Parties ont délibérément choisi de formuler les questions qu'elles ont posées au Tribunal. Quant à la raison pour laquelle elles ont formulé les questions de cette manière, un tribunal n'a pas à chercher plus loin que les mots de Charles De Visscher:

> « Il n'est pas rare qu'il faille considérer comme adéquate une interprétation qui n'assigne au traité qu'une efficacité restreinte, à première vue peu conforme à ce qui, en bonne logique, pourrait apparaître comme son but. Cette inefficacité partielle peut s'expliquer, en fait, par la volonté réfléchie des contractants de ne pas s'engager au-delà d'un certain point. » (De Visscher, *op. cit.*, p. 77.)

(Signé) Mohamed SHAHABUDDEEN.

OPINION DISSIDENTE COMMUNE DE MM. AGUILAR MAWDSLEY ET RANJEVA

1. Tout en souscrivant aux décisions et à l'analyse de la Cour sur l'inexistence et l'abus de procédure, nous tenons à expliquer notre désaccord sur l'interprétation que la Cour, par le vote de la majorité de ses membres, donne aux règles de droit dont l'application a abouti au rejet de la requête en nullité de la sentence attaquée. Nous sommes convaincus que la Cour devait prononcer la nullité absolue de la sentence du 31 juillet 1989 attaquée, ainsi que l'a indiqué notre vote au paragraphe 2 du dispositif du présent arrêt. Mais dans la mesure où cette conviction n'a pas été suivie par la Cour, rien n'interdisait d'émettre un vote positif ou négatif au paragraphe 3 relatif aux effets de la validité de la sentence.

2. L'affaire est d'une importance particulière en raison des problèmes de méthode judiciaire et arbitrale qu'elle soulève. Elle présente des difficultés particulières car il s'agit d'un de ces cas dans lesquels la solution adoptée par la Cour dépend de la manière dont les problèmes sont abordés. Une approche fondée sur une démarche principalement technique ne peut pas donner satisfaction dans la mesure où elle ne permet pas de résoudre les interactions permanentes entre la norme et les méthodes d'interprétation de ladite norme. En effet l'examen de la nullité/validité voire de l'invalidité d'une sentence arbitrale amène à se prononcer sur la validité épistémologique de l'interprétation retenue par la juridiction arbitrale.

3. Dans le présent cas, on observera tout d'abord que, tout en validant la sentence arbitrale, la Cour n'a pas, à juste titre, hésité à mettre en évidence les lacunes et les faiblesses de celle-ci. Par ailleurs, les Parties au litige, par-delà les déclarations de principe, ont annoncé qu'elles étaient disposées à aménager de manière judiciaire et/ou conventionnelle les effets d'une nullité, éventuellement acquise, de la sentence attaquée. La Guinée-Bissau a introduit une nouvelle requête au fond dont les conclusions ont été reportées dans le texte de l'arrêt, tandis que le Sénégal se déclare prêt à envisager soit des négociations soit un recours devant la Cour de céans. Cette volonté convergente des Parties en faveur d'une solution définitive de l'ensemble du différend sur la base du droit doit être approuvée et pleinement appuyée. Toujours est-il que, sur le plan du droit strict, aucune certitude ne peut être établie quant à une solution définitive du différend opposant la Guinée-Bissau au Sénégal et ce malgré une procédure déjà trop longue, très complexe et excessivement onéreuse

JOINT DISSENTING OPINION
OF JUDGES AGUILAR MAWDSLEY AND RANJEVA

[Translation]

1. While endorsing the decisions and analysis of the Court with respect to both inexistence and the "abuse of legal process", we feel we should explain our disagreement with the interpretation that the Court, by the vote of the majority of its Members, is giving to the rules of law whose application has occasioned the dismissal of the Application alleging the nullity of the contested Award. We are convinced that the Court should have declared the contested Award of 31 July 1989 to be an absolute nullity, as shown by our vote on paragraph 2 of the Operative Part of the Judgment in this case. But since the Court did not share this conviction, nothing stood in the way of an affirmative or a negative vote on paragraph 3, concerning the effects of the validity of the Award.

2. The case is of a particular significance because of the problems of judicial and arbitral method that it raises. It presents some particular difficulties as it is the kind of case in which the solution adopted by the Court depends upon the way in which the problems are tackled. An approach based upon primarily technical considerations will be bound to prove unsatisfactory in so far as it does not enable one to resolve the permanent interactions between the norm and the methods of interpretation of that norm. Indeed, an examination of the nullity/validity or even invalidity of an arbitral award involves a decision on the epistemological validity of the interpretation adopted by the arbitration tribunal.

3. In the present case, it will be seen from the outset that, while validating the Arbitral Award, the Court has quite rightly shown no hesitation about stressing the lacunae and weaknesses of that Award. Moreover, the Parties to the dispute, going beyond their declarations of principle, have announced that they were disposed to make judicial and/or conventional arrangements to cope with the effects of any finding of nullity of the contested Award. Guinea-Bissau has filed a new Application on the merits the submissions of which have been reproduced in the text of the Judgment, whereas Senegal declares that it is ready to envisage either negotiations or recourse to this Court. This convergent will of the Parties to arrive at a definitive solution of the whole of the dispute, on the basis of law, should be approved and given full support. However, from a strictly legal standpoint, one cannot be certain of a definitive solution of the dispute between Guinea-Bissau and Senegal, in spite of proceedings that have already proved unduly lengthy, very complex and excessively costly for

pour des Etats dont les économies, principalement pour la Partie demanderesse, sont tributaires des ressources de la mer[1].

4. En raison de la nature de la compétence de la Cour internationale de Justice, dans la mesure où la présente procédure ne relève ni de l'appel ni de la cassation, mais d'un recours en annulation, nous nous abstiendrons de critiquer quant au fond les décisions du Tribunal arbitral qui relèvent de la responsabilité collégiale de ce Tribunal. Par ailleurs, en raison de la nouvelle requête introduite par la Guinée-Bissau, certaines questions doivent être *in petto* considérées comme pendantes devant la Cour.

5. Mais, comme organe judiciaire principal de la communauté internationale, la Cour internationale de Justice, à notre avis, a une mission spécifique : assurer la promotion de la paix et de la sécurité internationales et le développement des relations amicales entre les Etats, c'est-à-dire le règlement pacifique, par la voie juridictionnelle entre autres, des différends qui opposent les Etats. A ce titre, elle est naturellement incitée, en raison de son recrutement et de la représentation des principaux systèmes juridiques, à soutenir les solutions arbitrales, même si elle peut être amenée à porter un regard critique vis-à-vis des sentences arbitrales, dès lors qu'est posée la question du respect par l'arbitre du droit processuel, et à se montrer exigeante quant au caractère évident de l'autorité d'une sentence. C'est à ce prix que pourra être mieux assise la sécurité juridique dans les relations internationales et que sera consolidée la confiance, placée par les Etats, notamment les Etats en développement, dans ce mode de règlement des différends.

6. Trois points liés au problème de l'autorité de la sentence arbitrale du 31 juillet 1989 soulèvent de notre part des observations critiques :

I. L'autorité de la sentence arbitrale du 31 juillet 1989 et l'autorité de la chose jugée ;
II. La question de la solution définitive de l'ensemble du différend opposant la Guinée-Bissau et le Sénégal ;
III. La défaillance du Tribunal arbitral et l'excès de pouvoir.

* * *

I. L'AUTORITÉ DE LA SENTENCE ARBITRALE DU 31 JUILLET 1989 ET L'AUTORITÉ DE LA CHOSE JUGÉE

7. L'omission du recours au concept juridique de l'autorité de la chose jugée mérite d'être relevée. En effet, la présomption irréfragable de vérité légale qui est attachée à une décision de justice devenue définitive est une institution commune à tous les systèmes de droit et sert de fondement au

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[1] Une référence à l'article 33, paragraphe 1, de la Charte des Nations Unies, par analogie à l'article 279 de la convention des Nations Unies sur le droit de la mer, aurait été la bienvenue.

States whose economies, particularly in the case of the Applicant, are dependent upon maritime resources [1].

4. Because of the nature of the Court's jurisdiction, the present proceedings being neither an appeal nor application for cassation but an application for annulment, we shall abstain from criticizing the substance of the findings of the Arbitration Tribunal which are the collective responsibility of that Tribunal. Moreover, because of the new Application filed by Guinea-Bissau, certain questions must, *in petto*, be seen as pending before the Court.

5. However, the International Court of Justice, as the principal judicial organ of the international community, has in our view a specific mission, that of securing the promotion of international peace and security and the development of friendly relations between States — or, in other words, the peaceful settlement, by judicial means among others, of such disputes as arise between the States. On that score, the Court is naturally inclined, because of the way in which judges are recruited and the representation of the principal legal systems, to lend support to arbitral solutions, even though it may be led to cast a critical eye upon arbitral awards, once there has been any question about the arbitrators' respect for procedural law, and to prove exacting with respect to the evident character of authority of an award. This is the price of providing a sounder basis for legal security in international relations and of consolidating the trust placed by States, more particularly by developing States, in this mode of dispute settlement.

6. Three points linked to the problem of the authority of the Arbitral Award of 31 July 1989 lead us to make some critical comments:

I. The authority of the Arbitral Award of 31 July 1989 and *res judicata*;

II. The question of the definitive settlement of the whole of the dispute between Guinea-Bissau and Senegal;

III. The shortcomings of the Arbitration Tribunal and *excès de pouvoir*.

* * *

I. THE AUTHORITY OF THE ARBITRAL AWARD OF 31 JULY 1989 AND *RES JUDICATA*

7. The failure to resort to the legal concept of *res judicata* is worthy of note. Indeed, the irrebuttable presumption of legal truth that attaches to a judicial decision once it has become final is an institution common to all systems of law and serves as a basis for the binding character of judicial

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[1] A reference to Article 33, paragraph 1, of the Charter of the United Nations by analogy with Article 279 of the United Nations Convention on the Law of the Sea, would have been welcome.

caractère obligatoire des sentences juridictionnelles. Dans nos observations préliminaires, nous avons rappelé que la Cour a critiqué la sentence. En outre, différents faits regrettables ont émaillé la procédure arbitrale. Nous relèverons notamment: la méthode et la durée excessivement longue de la procédure arbitrale; la technique de travail du Tribunal; l'absence injustifiée d'un arbitre; la déclaration du président du Tribunal; le caractère inachevé de la délimitation après les travaux du Tribunal arbitral. Prises isolément ces critiques peuvent ne pas être suffisantes pour justifier en droit strict la nullité de la sentence attaquée. Mais, envisagées de manière cumulative, ces objections constituent un faisceau de faits qui, d'une part, sont de nature à faire naître un doute très sérieux qui affecte directement la valeur intrinsèque d'une décision de justice et qui, d'autre part, sont la cause d'effets destructeurs quant à l'autorité même de la sentence, et de sa capacité à servir de base au règlement du différend.

8. Pour la Cour, sur le plan de la technique juridique, il n'y aurait eu aucune difficulté à rejeter la requête de la Partie demanderesse en lui opposant, d'une part, les dispositions de l'article 10 du compromis d'arbitrage et, d'autre part, la règle de l'autorité de la chose jugée avec ses conséquences de droit. Une telle réponse aurait été acceptable sur le plan du formalisme juridique et aurait eu le mérite de la simplicité. Mais la démarche retenue est critiquable pour la raison suivante: la Cour, après avoir constaté que le Tribunal a accompli de façon correcte sa mission, se livre ensuite à sa propre analyse de la nature de la relation qui existe entre la première et la seconde question de l'article 2 du compromis d'arbitrage.

A notre avis, la Cour aurait dû compléter cette démarche en mettant bien en évidence l'interaction qui existe entre les griefs formulés contre la sentence et son environnement, d'une part, et l'autorité de la chose jugée, d'autre part. En effet la valeur de la décision du Tribunal ne dépend pas uniquement des qualités intrinsèques de sa démonstration; il faut aussi tenir compte de l'ensemble des éléments qui constituent l'environnement de la sentence attaquée.

9. Pour notre part, l'autorité de la chose jugée qui fonde l'autorité même de toute décision judiciaire dépasse le cadre des bases axiomatiques du droit. Elle est une conséquence d'un faisceau de phénomènes (actes, règles, comportement, environnement...) qui doivent être pris en considération car ils contribuent au renforcement de la *convictio juris*. La démarche et la technique judiciaires ne doivent pas être exposées à une critique tirée de la « stratégie du soupçon ». Aussi nous paraît-il indispensable que, tout en adoptant une démarche concrète, un tribunal arbitral utilise aux fins de sa démonstration plusieurs et différentes techniques d'argumentation de façon à étayer et à valider sa propre méthode et ses conclusions. En l'absence de mécanisme contraignant, les conclusions judiciaires ne peuvent obtenir l'adhésion de l'esprit, *convictio juris*, qu'en faisant simultanément appel au vraisemblable, au plausible et au probable. En effet, dans un domaine différent, la logique a pu connaître un développement important lorsque, renonçant aux seules techniques

decisions. In our preliminary observations, we mentioned that the Court has criticized the Award. Moreover, the arbitral proceedings were punctuated by various regrettable facts. We refer, in particular, to the method and excessively lengthy duration of the arbitral proceedings, the Tribunal's technique of work, the unjustified absence of one arbitrator, the declaration made by the President of the Tribunal, and the incomplete character of the delimitation after the Tribunal had done its work. Taken separately, these criticisms may not suffice to justify, in strict law, a finding of nullity. However, if considered cumulatively, those objections do constitute a set of facts which, on the one hand, are such as to give rise to a very serious doubt directly affecting the intrinsic value of a judicial decision while, on the other hand, producing effects that undermine the very authority of the Award and its capacity to serve as a basis for dispute settlement.

8. As a matter of legal technique, the Court would have had no difficulty in rejecting the Applicant's request by invoking against it, firstly, the provisions of Article 10 of the Arbitration Agreement and, secondly, the rule of *res judicata* with its consequences in law. Such a response would have been acceptable from the standpoint of legal formalism and would have had the virtue of simplicity. However, the approach adopted is open to criticism on the grounds that the Court, having observed that the Tribunal had correctly accomplished its mission, then proceeds to its own analysis of the nature of the relationship between the first and second questions in Article 2 of the Arbitration Agreement.

In our view, the Court should have followed up on that approach by giving prominence to the interaction between the complaints against the Award and its attendant circumstances, on the one hand, and the authority of *res judicata*, on the other. Indeed, the value of the Tribunal's decision does not depend solely upon the intrinsic qualities of its arguments; account must also be taken of the whole set of elements surrounding the contested Award.

9. We would maintain that the concept of *res judicata* which underlies the very authority of any judicial decision, goes beyond the framework of the axiomatic bases of the law. It is a consequence of a whole set of phenomena (acts, rules, conduct, attendant circumstances . . .) which have to be taken into consideration as they contribute to the reinforcement of the *convictio juris*. The judicial approach and technique should not be exposed to criticism derived from a strategy conditioned by mistrust. We accordingly consider it necessary for an arbitration tribunal, while adopting a specific form of procedure, to use, in order to develop its reasoning, a number of different techniques of argument so as to support and validate its own method and conclusions. In the absence of an enforcement mechanism, judicial conclusions can only command intellectual support, *convictio juris*, if they rely at once upon what is likely, what is plausible, and what is probable. Indeed, in a different sphere, logic was able to undergo a significant development when, abandoning purely scholastic

scolastiques, elle a fait appel à d'autres méthodes démonstratives et argumentaires, notamment la mathématique.

10. Le débat judiciaire est en effet une confrontation entre deux logiques formelles dont l'objet est de démontrer l'incompatibilité de la logique de l'adversaire avec la norme et la règle de droit. Dans ces conditions, le juge doit dépasser la technique de la logique formelle pour vider le litige car «le ridicule et l'effrayant» représentent l'ultime conséquence de cette technique d'argumentation; or seule l'intervention de considérations de fait, telles que l'expérience quotidienne, le sens de l'incertain, du provisoire ou de l'aléatoire, peut rompre le cercle vicieux de cet univers des formes. Ainsi la logique dialectique, dans le débat judiciaire, est précieuse, car la solution ainsi dégagée pourra être plus raisonnablement acceptée comme la moins mauvaise des possibles à défaut d'être la meilleure. Il est en effet hautement souhaitable qu'une décision juridictionnelle apparaisse comme raisonnable et juste grâce à une compréhension pédagogique de la démarche du juge. Malheureusement, la logique formelle répond rarement de façon immédiate à ces considérations.

11. Si le tribunal arbitral est tenu de donner suite à cette exigence d'autorité, on ne peut ignorer aussi le droit des parties de bénéficier d'une bonne administration de la justice. En effet, la justice internationale tire toute son autorité de la confiance que les parties lui portent et il n'est que justice que cette confiance ne puisse être ébranlée ou altérée.

12. Ces considérations sont sources d'obligations pour le tribunal et les arbitres; à titre énonciatif, quelques-unes peuvent être rappelées à l'occasion de cette affaire: courtoisie des membres du tribunal; transparence de la méthode judiciaire observée; démarche réflexive et démonstrative; règlement définitif de l'ensemble du différend soumis à la justice selon les termes, l'objet et le but du compromis d'arbitrage; célérité de la délibération. Le tribunal arbitral et les membres ont l'obligation impérative de veiller à ce que la plénitude de l'autorité soit conférée à la chose jugée. C'est la raison pour laquelle nous sommes convaincus qu'une décision dont l'autorité est fortement contestée perd une très large part de sa valeur juridique; sa «remise en cause» la prive de l'autorité de la chose jugée.

II. La question de la solution définitive de l'ensemble du différend opposant la Guinée-Bissau et le Sénégal

13. Dans le paragraphe 66 de l'arrêt, la Cour établit un constat d'une importance capitale pour la pratique et l'avenir de l'arbitrage. L'exercice de la compétence a amené le Tribunal à renoncer à résoudre complètement le différend qui, lors de la signature du compromis, opposait les Parties en ce qui concerne la délimitation des espaces maritimes relevant de chacune d'entre elles. Nous n'insisterons pas sur les conséquences particulièrement lourdes pour deux Etats en développement d'un tel

techniques, it resorted to other methods of demonstration and argument and, more particularly, to mathematics.

10. A judicial discussion is in fact a confrontation between two formal systems of logic, with a view to showing that one's adversary's logic is incompatible with the norm and rule of law. Under those circumstances, the judge has to go beyond the techniques of formal logic in order to settle the dispute, as that technique of argument is bound to lead, in the end, to "the ridiculous and the terrifying". Only the intervention of factual considerations such as the experience of daily life, the sense of the uncertain, provisional or aleatory, can break the vicious circle of this universe of forms. This means that dialectical logic is invaluable in judicial argument, as the solution thus arrived at may more reasonably be accepted as the least unsatisfactory of possible solutions, even if it is not the best. It is indeed highly desirable that a judicial decision may be seen as reasonable and just, thanks to a pedagogical comprehension of the way in which it has been reached. Unfortunately it is unusual for formal logic to respond immediately to those considerations.

11. While an arbitration tribunal is bound to act on that imperative need of authority, account must also be taken of the parties' right to expect justice to be properly administered. Indeed, international adjudication derives the whole of its authority from the trust placed in it by the parties, and it is only fair that that trust should be neither shaken nor impaired.

12. These considerations are sources of obligations for the tribunal and the arbitrators. By way of an enunciation, some of them may be called to mind in the context of this case: i.e., courtesy of the members of the tribunal; transparency of the judicial method adopted; reflexive and demonstrative approach; definitive settlement of the whole of the dispute submitted for adjudication, in accordance with the terms, object and purpose of the Arbitration Agreement; celerity of the deliberation. The arbitration tribunal and its members are imperatively required to ensure that the decision has the full authority of *res judicata*. This is why we are convinced that a decision whose authority is strongly contested loses a very large measure of its legal value; its being "called into question" deprives it of the authority of *res judicata*.

II. THE QUESTION OF THE DEFINITIVE SETTLEMENT OF THE WHOLE OF THE DISPUTE BETWEEN GUINEA-BISSAU AND SENEGAL

13. In paragraph 66 of the Judgment, the Court makes a point of fundamental importance for the practice and the future of arbitration. The exercise of its jurisdiction led the Tribunal to forgo a complete settlement of the dispute that, at the time of signature of the Arbitration Agreement, existed between the Parties with respect to the delimitation of the maritime areas appertaining to each one of them. We shall not dwell on the particularly serious consequences of such a result for two developing

résultat. Le Tribunal arbitral avait l'obligation de régler définitivement et complètement le différend qui lui était soumis, selon les termes du compromis en général, dont l'article 2 n'est qu'un simple élément. A titre de simple référence à différents systèmes juridiques nationaux, nous aimerions évoquer le système dit de l'économie de procédure qui est plus contraignant. Selon ce principe, les juges saisis d'un problème ont l'obligation de chercher les moyens qui permettent de vider l'ensemble d'un différend, dans les meilleurs délais possibles et au moindre coût pour les parties. Il nous paraît souhaitable que le juge international prenne en considération ces idées pratiques en raison de la nature très complexe du contentieux international.

14. Pour la Cour, le résultat de la sentence attaquée est directement lié à la rédaction du compromis d'arbitrage. Nous pensons qu'il n'appartient pas à la Cour de confirmer ou d'infirmer le raisonnement de la juridiction arbitrale quant à la qualité de la rédaction du compromis que les Parties ont conclu: la Cour a le devoir de vérifier que le Tribunal a fait une correcte et satisfaisante application des règles d'interprétation des traités, en l'occurrence du compromis d'arbitrage. Dans ces conditions, la question est de déterminer si une interprétation fondée exclusivement sur une analyse littérale des neuf mots introductifs de la seconde question posée au Tribunal est suffisante pour dégager le contenu de la volonté commune des Parties. Nous souscrivons pleinement aux développements consacrés par M. Weeramantry aux règles qui régissent l'interprétation des conventions internationales. Il appartient à la juridiction saisie de tenir simultanément compte des trois éléments constitutifs d'un accord international: la lettre, l'objet et le but de l'accord. La difficulté inhérente à l'interprétation du compromis d'arbitrage tient à la double nature de cet instrument: acte diplomatique, le compromis est un élément qui fournit de nouvelles données aux négociations entre les Parties; mais, acte juridique, le compromis détermine les éléments qui structurent l'objet du différend. Aussi nous apparaît-il insuffisant de se limiter à une simple analyse littérale.

Rappeler au Tribunal la règle de l'interprétation syncrétique ou symbiotique des trois éléments susmentionnés n'est pas rechercher une autre signification de l'accord; c'est simplement respecter dans toute sa plénitude la volonté des Parties, exercice difficile s'il en est.

15. Dans la présente affaire de la sentence arbitrale, la Cour, rejoignant en cela le président du Tribunal arbitral, M. Barberis, constate que la sentence n'a pas délimité l'ensemble des territoires maritimes qui relèvent respectivement de la Guinée-Bissau et du Sénégal. En outre, elle a accepté la démarche du Tribunal qui a réduit les termes du problème à une question de succession d'Etats: maintien en vigueur de l'échange de lettres franco-portugais de 1960. Nous souscrivons certes sans difficulté au principe selon lequel n'existe pas pour le juge international une obligation analogue à celle édictée par l'article 4 du Code civil français, principe rappelé par le Tribunal arbitral égypto-israélien dans l'affaire de Taba: «The Tribunal has not the task to determine the course of the boundary

countries. The Arbitration Tribunal was under an obligation to settle the dispute submitted to it definitively and completely, in accordance with the terms of the Arbitration Agreement in general, of which Article 2 is no more than one element. By way of a mere reference to various national legal systems, we would mention the system known as that of procedural economy, which is more compelling. This principle requires that judges to whom a problem has been submitted should seek for the means enabling the whole of the dispute to be resolved, at the earliest possible date and at the lowest possible cost to the parties. Given the very complex nature of international litigation, it appears to us advisable that the international judge should take these practical ideas into consideration.

14. For the Court the result of the Award contested is directly linked to the drafting of the Arbitration Agreement. We believe that it is not for the Court to confirm or reject the reasoning of the Arbitration Tribunal as to the quality of the drafting of the Agreement the Parties concluded: it is the duty of the Court to ascertain that the Tribunal has made a correct and satisfactory application of the rules concerning the interpretation of treaties, in this instance of the Arbitration Agreement. Consequently, the question is whether an interpretation based exclusively on a literal analysis of the prefatory words of the second question put to the Tribunal suffices to bring out the content of the common will of the Parties. We subscribe fully to the points made by Judge Weeramantry with respect to the rules governing the interpretation of international conventions. It is incumbent on the court seised of a dispute to take simultaneously into account the three constitutive elements of an international agreement: the letter, the object and the purpose of the agreement. The difficulty inherent in the interpretation of the Arbitration Agreement results from the dual nature of this instrument: as a diplomatic act, that Agreement is an element introducing new factors into the negotiations between the Parties; but, as a legal act, it determines the elements structuring the object of the dispute. For these reasons we consider a mere literal analysis to be insufficient.

To recall to the Tribunal the rule of syncretic or symbiotic interpretation of the three above-mentioned elements does not amount to an attempt to give the Agreement another meaning; all it does is to respect fully the will of the Parties, a difficult exercise if ever there was one.

15. In the present case of the Arbitral Award, the Court notes, as did the President of the Arbitration Tribunal, Mr. Barberis, that the Award did not delimit the whole of the maritime areas appertaining respectively to Guinea-Bissau and Senegal. Moreover, the Court accepted the line of argument of the Tribunal whereby it reduced the terms of the problem to a question of State succession: maintenance in force of the Franco-Portuguese Exchange of Letters of 1960. To be sure, we have no difficulty in subscribing to the principle that there does not exist for the international judge an obligation analogous to that laid down by Article 4 of the French Civil Code, a principle recalled by the Arbitral Tribunal set up by Egypt and Israel in the *Taba* case: "The Tribunal has not the task to determine

from BP 91 to the shore and beyond. » (*International Legal Materials*, vol. 27, n° 4, p. 82.) Mais sans avoir à substituer ses propres motivations à celles du Tribunal arbitral, la Cour a, de notre point de vue, le devoir d'évoquer le silence du Tribunal arbitral sur la contradiction évidente et immédiate entre les résultats de la sentence et quelques observations de caractère littéral, indiscutables, telles que :

1) L'appellation du Tribunal :

TRIBUNAL ARBITRAL POUR LA DÉTERMINATION DE LA FRONTIÈRE MARITIME	TRIBUNAL ARBITRAL PARA A DETERMINAÇÃO DA FRONTEIRA MARÍTIMA
GUINÉE-BISSAU/SÉNÉGAL	GUINÉ-BISSAU/SENEGAL

2) Le préambule du compromis du 12 mars 1985 — le but du traité :

> « Reconnaissant qu'ils n'ont pu résoudre par voie de négociation diplomatique le différend relatif à la détermination de leur frontière maritime,
>
> Désirant, étant donné leurs relations amicales, parvenir au règlement de ce différend dans les meilleurs délais, et à cet effet ayant décidé de recourir à un arbitrage ».

3) L'objet du différend selon le Tribunal arbitral dans la sentence :

> « 27. Le seul objet du différend soumis par les Parties au Tribunal porte donc sur la détermination de la frontière maritime entre la République du Sénégal et la République de Guinée-Bissau, question qu'elles n'ont pu résoudre par voie de négociation. »

Le silence du Tribunal arbitral sur ces données simples est critiquable et ce n'est pas réclamer une interprétation autre de la convention que d'interpeller la sentence sur la validité d'un raisonnement linéaire, au surplus unilatéral, et sa cohérence intrinsèque. Contrairement à l'avis exprimé par la Cour au paragraphe 55, nous pensons que c'est la conclusion qui doit être lue à la lumière du titre du Tribunal, du but du traité et de la définition du différend et non l'inverse.

16. Que la proposition conditionnelle de la question 2 soit source de difficultés pour l'interprétation de la convention, c'est l'évidence même, mais semble avoir été oublié le fait que ces neuf mots introductifs représentent le prix diplomatique du règlement du différend par voie arbitrale. Par ailleurs, il appartenait au Tribunal d'assurer une présentation cohérente de toutes les données du différend dans le cadre d'une interprétation correcte et complète du traité. Tout est par ailleurs dit et donné dans le compromis pour que des travaux du Tribunal puisse sortir une ligne fron-

the course of the boundary from BP91 to the shore and beyond" (*International Legal Materials*, Vol. 27, No. 4, p. 82). But, without having to substitute its own reasons for those of the Arbitration Tribunal, the Court has, from our point of view, an obligation to take into account the silence of the Arbitration Tribunal over the obvious and immediate contradiction between the results of the Award and a number of observations of a literal, unquestionable nature, such as:

(1) The title of the Tribunal

TRIBUNAL ARBITRAL POUR LA DÉTERMINATION DE LA FRONTIÈRE MARITIME	TRIBUNAL ARBITRAL PARA A DETERMINAÇÃO DA FRONTEIRA MARÍTIMA
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(2) The Preamble of the Arbitration Agreement of 12 March 1985 — the purpose of the Treaty:

> "Recognizing that they have been unable to settle by means of diplomatic negotiation the dispute relating to the determination of their maritime boundary,
>
> Desirous, in view of their friendly relations, to reach a settlement of that dispute as soon as possible and, to that end, having decided to resort to arbitration".

(3) The object of the dispute according to the Arbitration Tribunal in the Award:

> "27. The sole object of the dispute submitted by the Parties to the Tribunal accordingly relates to the determination of the maritime boundary between the Republic of Senegal and the Republic of Guinea-Bissau, a question which they have not been able to settle by means of negotiation."

The silence the Tribunal observed with regard to these simple elements is open to criticism and one can without requiring another interpretation of the convention call the Award into question over the validity of the linear, and additionally unilateral mode of reasoning and its intrinsic coherence. Contrary to the view expressed by the Court in paragraph 55, we consider that it is the conclusion that must be read in the light of the title of the Tribunal, the purpose of the treaty and the definition of the dispute, not the other way round.

16. That the conditional proposition of Question 2 should have been a source of difficulties for the interpretation of the convention is perfectly obvious; but the fact appears to have been forgotten that the prefatory words are the diplomatic price paid for the settlement of the dispute by arbitration. Furthermore, it was incumbent upon the Tribunal to ensure a coherent presentation of all the elements of the dispute within the framework of a correct and complete interpretation of the treaty. Moreover, all that is required in order that the work of the Tribunal should result in a

tière. L'échec du Tribunal arbitral dans l'accomplissement de sa mission est un facteur suffisamment grave qui porte préjudice à l'institution arbitrale elle-même. Aussi estimons-nous que la Cour devait prendre la responsabilité de poursuivre jusqu'à son terme son analyse en tirant la conclusion juridique de son constat de carence et d'échec.

III. LA DÉFAILLANCE DU TRIBUNAL ARBITRAL ET L'EXCÈS DE POUVOIR

17. Contrairement à la position de la majorité des membres de la Cour, nous estimons que le Tribunal arbitral avait l'obligation juridique de fournir une réponse explicite, et par un vote spécifique, à la seconde question de l'article 2 du compromis d'arbitrage, sur la base d'une pleine motivation.

18. Les observations de la Cour rappelant la pratique normale des juridictions arbitrales méconnaissent la nature juridique de ces pratiques en les reléguant au seul domaine des faits. En droit le juge manque gravement à sa mission lorsqu'il décide de ne pas répondre à une question. En effet, la question énonce les termes de la difficulté dont la solution est demandée au juge; la question constitue, dès lors, la cause juridique de la procédure juridictionnelle, qu'elle soit judiciaire ou arbitrale. Sur le plan diplomatique l'énoncé de la question souligne l'importance du problème soulevé. La doctrine estime que « le Tribunal doit juger tout point prévu au compromis, fût-il d'avis qu'il n'y a pas lieu de l'examiner » (voir A. Balasko, *Causes de nullité de la sentence arbitrale en droit international public*, Paris, Pedone, 1938, p. 200; en ce sens voir P. Fauchille, *Traité de droit international public*, Paris, 1926, première partie, t. III, p. 548). A l'appui de cette idée, on peut rappeler la jurisprudence de la Cour internationale de Justice dans l'affaire du *Détroit de Corfou*:

> « Aux termes de la première question du compromis, la Cour est invitée à répondre aux deux points suivants :
>
> i) l'Albanie est-elle responsable, selon le droit international, des explosions et des dommages et pertes humaines qui en seraient suivis, et
>
> ii) y a-t-il le cas de réparations à donner ?
>
> Ce texte a fait naître certains doutes. Si la réponse au premier point est affirmative, il en résulte déjà que réparation est due et il aurait été superflu d'ajouter le deuxième point, à moins que dans l'esprit des Parties ce point visât quelque chose de plus qu'une simple déclaration, aux termes de laquelle la Cour constaterait que réparation est due. Il serait en effet contraire aux règles d'interprétation généralement reconnues de considérer qu'une disposition de ce genre, insérée dans un compromis, soit une disposition sans portée et sans effet. A cet égard, la Cour se réfère à l'opinion exprimée par la Cour perma-

frontier line is said and given in the Arbitration Agreement. The failure of the Arbitration Tribunal to perform its mission is a sufficiently serious factor prejudicial to arbitration as an institution. We therefore consider that the Court should have taken it upon itself to carry its analysis to its conclusion by drawing the appropriate legal conclusion from the omission and the failure of which it took note.

III. THE SHORTCOMINGS OF THE ARBITRATION TRIBUNAL AND *EXCÈS DE POUVOIR*

17. Contrary to the majority of the Members of the Court, we believe that the Arbitration Tribunal was under a legal obligation to give an explicit answer, and to do so by a separate vote, to the second question of Article 2 of the Arbitration Agreement, on the basis of a full statement of its reasons.

18. The observations of the Court concerning the normal practice of arbitral tribunals disregard the legal nature of that practice by confining it within the area of facts. In law a judge seriously fails to perform his mission whenever he decides not to answer a question. For the question lays down the terms of the difficulty that the judge is asked to resolve; the question thus constitutes the legal cause of the litigation, whether it be judicial or arbitral. On the diplomatic plane the formulation of the question underlines the importance of the problem raised. The doctrinal position is that "the Tribunal must adjudicate every point referred to in the *compromis*, even if in its opinion it does not arise to be considered" (cf. A. Balasko, *Causes de nullité de la sentence arbitrale en droit international public*, Paris, Pedone, 1938, p. 200, whose opinion is shared by P. Fauchille, *Traité de droit international public*, Paris, 1926, Part I, Vol. III, p. 548). This is supported by the following observations of the International Court of Justice in its Judgment on the Merits in the *Corfu Channel* case:

> "In the first question of the Special Agreement the Court is asked:
>
> (i) Is Albania under international law responsible for the explosions and for the damage and loss of human life which resulted from them, and
> (ii) is there any duty to pay compensation?
>
> This text gives rise to certain doubts. If point (i) is answered in the affirmative, it follows from the establishment of responsibility that compensation is due, and it would be superfluous to add point (ii) unless the Parties had something else in mind than a mere declaration by the Court that compensation is due. It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect. In this connection, the Court refers to the views expressed by the Permanent Court of Interna-

> nente de Justice internationale à propos de questions d'interprétation semblables. Dans l'avis consultatif n° 13 en date du 23 juillet 1926, cette Cour s'est exprimée comme suit (*Série B n° 13*, p. 19): « Mais, pour autant qu'il s'agit de la question spécifique de compétence, actuellement débattue, il peut suffire d'observer que la Cour, en déterminant la nature et l'étendue d'une disposition, doit envisager ses effets pratiques plutôt que le motif prédominant par lequel on la suppose avoir été inspirée. » Dans son ordonnance du 19 août 1929 dans l'affaire des Zones franches, la Cour a dit (*Série A n° 22*, p. 13) que « dans le doute, les clauses d'un compromis par lequel la Cour est saisie d'un différend doivent ... être interprétées d'une manière permettant à ces clauses de déployer leurs effets utiles. » (*Détroit de Corfou, fond, C.I.J. Recueil 1949*, p. 23-24.)

Cette obligation de fournir une réponse à chaque question posée nous paraît plus contraignante pour une juridiction arbitrale que pour une juridiction judiciaire, dans la mesure où celle-ci est soumise à un *corpus* précodifié de procédure, le juge arbitral étant au contraire lié corps et âme à la volonté des Etats parties au différend.

Les observations de la Cour et la jurisprudence qu'elle invoque dans le paragraphe 50 de l'arrêt ne sont pas suffisantes pour justifier la décision de non-réponse à la seconde question bien que des éléments de fait puissent être rapprochés du présent cas : l'existence d'une condition préalable à la réponse à la question suivante. En premier lieu, la décision de non-réponse à la seconde question dans l'affaire de l'*Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase*, est précédée d'un constat de carence; car la Cour explique qu'il y aurait commission d'un excès de pouvoir si sa décision devait se substituer à la volonté des Parties (*C.I.J. Recueil 1950*, p. 230), tandis que, dans l'affaire de l'*Interprétation de l'accord gréco-bulgare du 9 décembre 1927*, la Cour permanente n'a pas manqué de relever l'incidence éventuelle de la non-réponse à la seconde question sur l'économie générale du questionnaire administré à la juridiction (*C.P.J.I. série A/B n° 45*, p. 87). Or nous avons relevé des lacunes de cette nature dans la sentence : l'éventualité d'un excès de pouvoir en cas de réponse à la seconde question, compte tenu de la réponse à la première, méritait une explication du Tribunal, tandis que les effets de la réponse à la première question sur l'économie générale du compromis ont fait l'objet d'un silence des arbitres que nous critiquons. Mais en second lieu, en matière d'obligation de fournir une réponse à chaque question, la jurisprudence invoquée par la Cour est peu appropriée. En effet, dans les trois cas cités, il s'agit d'avis consultatifs et non de décisions contentieuses. L'article 65 du Statut de la Cour est permissif. Il donne à la Cour le pouvoir d'apprécier si les circonstances de l'espèce sont telles qu'elles doivent la déterminer à ne pas répondre à une demande d'avis (*C.I.J. Recueil 1950*, p. 72) et ce dans la mesure où « la demande d'avis a un objet ... plus limité. Elle tend exclusivement à obtenir de la Cour certaines précisions juridiques... » (*ibid.*, p. 70). Cette différence de nature explique

> tional Justice with regard to similar questions of interpretation. In Advisory Opinion No. 13 of July 23rd, 1926, that Court said (*Series B, No. 13*, p. 19): 'But, so far as concerns the specific question of competence now pending, it may suffice to observe that the Court, in determining the nature and scope of a measure, must look to its practical effect rather than to the predominant motive that may be conjectured to have inspired it.' In its Order of August 19th, 1929, in the Free Zones case, the Court said (*Series A, No. 22*, p. 13): 'in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must . . . be construed in a manner enabling the clauses themselves to have appropriate effects'." (*Corfu Channel, Merits, I.C.J. Reports 1949*, pp. 23-24.)

This obligation to give a reply to each question put weighs, in our view, more heavily on an arbitral tribunal than on a judicial one to the extent that the latter is subjected to a pre-codified procedural *corpus*, whereas the arbitral judge is, on the contrary, bound body and soul to the will of the States Parties to the dispute.

The observations made by the Court and the case-law it cites in paragraph 50 of the Judgment are inadequate to justify the decision not to reply to the second question, even though certain factual elements can be considered to have a bearing on the present case: the existence of a condition precedent to the reply to a subsequent question. In the first place, before deciding, in its Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, not to reply to the second question, the Court noted a default; for it observed that it would commit an *excès de pouvoir* were its decision to be substituted for the will of the Parties (*I.C.J. Reports 1950*, p. 230), while, in the case of the *Interpretation of the Greco-Bulgarian Agreement of 9 December 1927*, the Permanent Court did not fail to note the possible incidence of a failure to reply to the second question on the questionnaire before it, as a whole (*P.C.I.J., Series A/B, No. 45*, p. 87). Now we have noted lacunae of this nature in the Award: the possibility of there being, regard being had to the reply to the first question, an *excès de pouvoir* in the event of a reply to the second one, should have been the subject of explanatory comments by the Tribunal, whereas the effects of the reply to the first question on the Arbitration Agreement as a whole were passed over in silence by the arbitrators, which we do not consider proper. But, in the second place, as regards the obligation to answer each question, the case-law cited by the Court is of scant relevance. The three cases cited are advisory, not contentious ones. Article 65 of the Statute of the Court is permissive. It gives the Court the power to examine whether the circumstances of the case are such as should lead it to decline to answer the request (*I.C.J. Reports 1950*, p. 72), and that in so far as "the object of the Request is . . . more limited. It [the Request] is directed solely to obtaining from the Court certain clarifications of a legal nature . . ." (*ibid.*, p. 70). This difference in nature makes

les limites de la transposition de la procédure consultative dans le cadre d'une procédure contentieuse dont l'objet est la consécration d'un droit.

19. Contrairement à la position de la majorité des membres de la Cour, nous sommes convaincus qu'en statuant *infra petita* et, en décidant de ne pas répondre à la seconde question, le Tribunal a commis un excès de pouvoir par omission et ce sans motivation.

20. En exerçant la compétence de la compétence, le Tribunal arbitral a-t-il effectivement accompli de manière licite la mission qui lui était dévolue, en ne justifiant pas de façon complète, à notre avis, son refus de réponse à la seconde question ? La Cour se déclare satisfaite de la motivation brève mais jugée suffisante que le Tribunal a utilisée pour justifier sa décision. La concision et la clarté sont effectivement des qualités rares, mais le problème n'est pas d'ordre quantitatif — il ne s'agit pas d'apprécier la longueur et les qualités littéraires et artistiques d'un raisonnement — mais d'ordre épistémologique. Quelle est la validité du recours à la conclusion logique pour justifier la non-réponse à la seconde question, décision non consacrée explicitement ni par un vote ni par un dispositif exprès ?

21. L'argumentation tirée de la conclusion logique est concevable, si les relations de cause à effet entre les deux propositions ont un caractère inéluctable. Or, dans le cas présent, ce trait de caractère n'est pas établi de façon évidente. Prises isolément, l'opinion dissidente du troisième arbitre ainsi que la déclaration du président du Tribunal remettent en cause les conclusions susceptibles d'être déduites de la proposition retenue par le Tribunal. En effet la déclaration de M. Barberis est en contradiction avec le texte de la sentence dans la mesure où elle reconnaît que le Tribunal a failli à sa compétence alors qu'il avait l'obligation d'accomplir jusqu'à son terme sa mission.

22. D'une manière générale, la valeur démonstrative de la conclusion logique se conçoit aisément dans les rapports de causalité. En revanche la logique juridique relève plus des relations d'imputabilité. La conclusion logique, dans ces conditions, peut apparaître pertinente lorsqu'en droit il s'agit d'assurer l'effectivité, la consolidation d'un droit déjà consacré. Au contraire, elle est nettement insuffisante pour justifier le rejet d'une requête tendant à obtenir le respect d'un droit; en refusant purement et simplement de prêter attention à d'autres prémisses, elle constitue une affirmation de principe et n'apparaît pas comme une technique démonstrative. Dans le cas de rejet d'une demande, la conclusion logique équivaut à une absence de motifs. Pour ces raisons, nous estimons que la non-réponse à la seconde question du compromis et le refus de joindre une carte à la sentence traduisent un défaut de motivation. Cette défaillance du Tribunal est-elle constitutive d'excès de pouvoir par omission ?

23. L'article 35 du modèle de règles sur la procédure arbitrale, élaboré par la Commission du droit international, met un terme au débat théorique sur la consécration de l'excès de pouvoir du tribunal comme cause de nullité d'une sentence arbitrale. De manière simple, on peut décrire l'excès de pouvoir comme la transgression par une juridiction compétente

clear the limits of the transposition of the advisory procedure into the setting of a contentious one, the object of which is to sanction a right.

19. Contrary to the position of the majority of the Members of the Court, we are convinced that by deciding *infra petita* and opting for not replying to the second question, the Tribunal committed an *excès de pouvoir* through omission and did so without stating its reasons.

20. In exercising the *compétence de la compétence*, did the Tribunal, which, in our opinion, failed to justify fully its refusal to reply to the second question, effectively perform, in a lawful manner, the mission entrusted to it? The Court declares itself satisfied with the statement of reasoning, succinct but judged to be sufficient, by which the Tribunal justified its decision. Concision and clarity are indeed rare qualities, but the problem is not quantitative — it is not a question of appreciating the length and the literary and artistic qualities of a line of reasoning — but epistemological. What is the validity of recourse to the logical conclusion to justify the absence of a reply to the second question, a decision which did not take explicit shape in a vote or an express operative provision?

21. The argument based on the logical conclusion is conceivable if the causal relationship between the two propositions is ineluctable in nature. But, in the present case, this is by no means clearly established. Taken in isolation, the dissenting opinion of the third Arbitrator, as well as the declaration of the President of the Tribunal, calls into question the conclusions that may be drawn from the proposition adopted by the Tribunal. For Mr. Barberis's declaration is in contradiction with the text of the Award in so far as the declaration recognizes that the Tribunal failed to exercise its jurisdiction even though it was under an obligation to perform its task fully.

22. Generally speaking, the demonstrative value of the logical conclusion is easily conceivable in relationships of causality. But legal logic has more to do with relations of imputability. This being so the logical conclusion may appear to be pertinent whenever in law the object is to ensure the effectivity, the consolidation of a right already created. On the contrary, it is altogether insufficient to justify the rejection of an application that aims to bring about respect for a right; in as much as it refuses purely and simply to pay due regard to other premises, it constitutes an affirmation of principle and does not appear to be a technique for demonstrating. In the case of the rejection of an application, the logical conclusion is the equivalent of a failure to give reasons. This is why we consider that the absence of a reply to Question 2 of the Arbitration Agreement and the refusal to annex a map to the Award reflect an absence of reasons. Does this default on the part of the Tribunal constitute an *excès de pouvoir* through omission?

23. Article 35 of the Model Rules on Arbitral Procedure elaborated by the International Law Commission brought to an end the theoretical debate as to whether *excès de pouvoir* on the part of the tribunal constitutes a ground of nullity of an arbitral award. To put the matter simply, the *excès de pouvoir* can be described as the transgression committed by a compe-

du cadre juridique de sa mission. Il « consiste en toute violation, toute méconnaissance, tout dépassement ou toute omission des dispositions de l'accord d'arbitrage... » (Balasko, *op. cit.*, p. 153). Dans un arbitrage, le compromis indique les décisions et les actes que le tribunal doit prendre ou édicter. Les dispositions du compromis, préambule et *corpus*, lient de façon impérative la compétence du tribunal arbitral; en revanche ce dernier jouit d'une compétence discrétionnaire pour la détermination, de manière explicite, des modalités par lesquelles l'arbitre parvient à ces décisions et ce afin d'écarter tout soupçon de nature à altérer l'autorité de la sentence. Dans ces conditions, l'excès de pouvoir de l'arbitre peut être commis par action ou par omission. Faute par le tribunal de statuer sur un point prévu par le compromis, il y a excès de pouvoir *infra petita*. La présente affaire de la sentence du 31 juillet 1989 représente un de ces cas exceptionnels.

24. *A contrario*, nous pensons qu'il appartenait au Tribunal de démontrer en quoi pouvait représenter un excès de pouvoir l'achèvement de la détermination de la ligne unique de frontière maritime entre la Guinée-Bissau et le Sénégal, et ce au regard de la réponse à la première question qu'énonçait l'article 2. Cette omission, à notre avis, est un manquement grave du Tribunal à sa mission.

25. Le refus de joindre une carte constitue ouvertement une autre violation des dispositions du compromis, pour les mêmes motifs que la décision de non-réponse à la seconde question. Si effectivement le Tribunal a estimé inutile l'établissement d'une carte en l'absence d'une part d'une réponse à la seconde question et d'autre part d'une délimitation globale de l'ensemble des espaces maritimes par une ligne frontière unique, la Cour se devait, à notre avis, compte tenu de cette défaillance, de contester le bien-fondé de la sentence dès lors qu'était en jeu le respect du droit des Parties à une bonne administration de la justice internationale.

(Signé) Andrés AGUILAR MAWDSLEY.

(Signé) Raymond RANJEVA.

tent tribunal of the legal framework of its mission. It "consists in any violation, any disregard, any overstepping of or non-compliance with the provisions of the Arbitration Agreement . . ." (Balasko, *op. cit.*, p. 153). In an arbitration the *compromis* sets forth the decisions and acts that the tribunal must take or decree. The provisions of the *compromis*, its preamble and its body, determine in a mandatory manner the jurisdiction of the arbitral tribunal; on the other hand, the latter enjoys discretionary powers to ascertain, in an explicit fashion, the modalities by which the arbitrator reaches those decisions, and that in order to guard against any suspicion which might impair the authority of the award. This being so, *excès de pouvoir* can be committed by the arbitrators through acts or omissions. If the tribunal fails to adjudicate on a point referred to in the *compromis*, there is *excès de pouvoir infra petita*. The present case of the Award of 31 July 1989 involves one of these exceptional cases.

24. *A contrario*, we consider that it was incumbent on the Tribunal to demonstrate how an *excès de pouvoir* could result from its completion of the determination of the single line of the maritime boundary between Guinea-Bissau and Senegal, regard being had in this respect to the reply to the first question put in Article 2. This omission is, in our opinion, a serious failure by the Tribunal to perform its mission.

25. The refusal to include a map manifestly constitutes another violation of the provisions of the Arbitration Agreement, for the same reasons as in respect of the decision not to reply to the second question. If the Tribunal did in fact consider it unnecessary to prepare a map in the absence, on the one hand, of a reply to the second question and, on the other, of a global delimitation of the maritime spaces as a whole by a single boundary line, the Court should, in our opinion, having regard to this omission, have called into question the soundness of the Award inasmuch as the necessary respect for the right of the Parties to a proper administration of international justice was at stake.

(Signed) Andrés AGUILAR MAWDSLEY.

(Signed) Raymond RANJEVA.

DISSENTING OPINION OF JUDGE WEERAMANTRY

This case arises out of an arbitration which has followed a most unusual course, thereby throwing up a fascinating range of legal issues. Among them are issues concerning the interpretation of arbitral agreements and the nullity of arbitral awards.

Apart from the two issues mentioned, I am in agreement with the Court on the numerous issues which have been argued before us at some length. To the Court's lucid exposition of these issues, there is nothing I can usefully add. Among the matters on which I respectfully share the Court's opinion are its rejection of Senegal's contentions of lack of jurisdiction and of abuse of process by Guinea-Bissau. Likewise, I am in full agreement with the Court's rejection of Guinea-Bissau's contentions that the absence of Arbitrator Gros at the delivery of the Award lessened its authority and that the Award was invalidated by the Tribunal's failure to state its reasons in full and to produce a map showing the boundary line. I associate myself with the Court's succinct and cogent rejection of these contentions.

I regret, however, that the view I have taken on the two matters set out at the commencement of this opinion leads me to a different conclusion on the overall result. The questions on which I differ are sufficiently important in my view to warrant extended consideration.

I shall not burden this opinion with a recital of the facts, which are set out in the Judgment of the Court. I only note the unusual course followed by this arbitration, in that there was a declaration by the President stating his own preference for a form of words "more precise" than the phraseology adopted in the majority decision to which he was a party. He goes on to state that if this "more precise" phraseology had been used, this would have enabled the Tribunal to deal with the second question, which the Tribunal, by a majority decision to which he was again a party, had decided it was not called upon to address. The President also observed that a reply of the kind suggested by him would have enabled the Tribunal to delimit the waters of the exclusive economic zone and the fishery zone, and thus settle the whole of the dispute. The failure to address Question 2 and to settle the whole dispute constitute the gravamen of Guinea-Bissau's complaint. Indeed, the President's declaration so troubled the third arbitrator, Mr. Bedjaoui, as to prompt him to state in his dissenting opinion that the declaration "by its very existence as well as by its con-

OPINION DISSIDENTE DE M. WEERAMANTRY

[Traduction]

La présente affaire a pour origine un arbitrage qui a connu un cours inhabituel, soulevant au passage une gerbe de passionnantes questions de droit parmi lesquelles la question de l'interprétation des compromis d'arbitrage et celle de la nullité des sentences arbitrales.

Mises à part ces deux questions, je suis d'accord avec la Cour sur les nombreux points que nous avons longuement discutés. Il n'y a rien que je puisse utilement ajouter à l'exposition parfaitement claire de ces questions par la Cour. En particulier, je m'associe respectueusement à l'avis de la Cour disant que les thèses du Sénégal portant sur le défaut de compétence et sur l'abus de procédure de la part de la Guinée-Bissau ne sont pas fondées. Je suis pleinement d'accord aussi pour ne pas accueillir les thèses de la Guinée-Bissau selon lesquelles l'absence de M. Gros lors du prononcé de la sentence affaiblissait l'autorité du Tribunal et la sentence était frappée de nullité par le fait que le Tribunal n'avait pas pleinement motivé sa décision et n'avait pas établi de carte comportant le tracé d'une ligne frontière. Je m'associe au rejet de ces thèses tel qu'il est exprimé de manière succincte et convaincante par la Cour.

Toutefois, je regrette de dire que mon analyse des deux questions mentionnées au premier paragraphe de la présente opinion m'amène à une conclusion générale qui n'est pas celle de la Cour. Les points de divergence me paraissent suffisamment importants pour faire l'objet d'un examen approfondi.

Je n'alourdirai pas le contenu de cette opinion avec une présentation des faits, lesquels sont exposés dans l'arrêt de la Cour. Je noterai seulement le cours inhabituel de l'arbitrage en cause, dû au fait que le président du Tribunal a fait une déclaration indiquant qu'il aurait préféré une formulation « plus précise » que celle employée dans la décision de la majorité pour laquelle il avait voté. Selon lui, une formulation « plus précise » aurait habilité le Tribunal à traiter la seconde question, question au sujet de laquelle le Tribunal a estimé, par une décision majoritaire à laquelle le président a également contribué, qu'elle n'appelait pas une réponse de sa part. Le président a également fait observer qu'une réponse comme celle qu'il suggérait aurait habilité le Tribunal à délimiter les eaux de la zone économique exclusive et de la zone de pêche et, partant, à régler intégralement le différend. Le défaut de réponse à la seconde question et l'absence de règlement de la totalité du différend constituent l'essentiel de la plainte de la Guinée-Bissau. En fait, la déclaration du président a troublé le troisième membre du Tribunal, M. Bedjaoui, au point d'inciter

tents, justifies more fundamental doubts as to the existence of a majority and the reality of the Award" (para. 161).

Despite these features which cause concern, I am prepared, with the Court, to take the view that it is the President's vote we must have regard to rather than his somewhat inconsistent declaration. We must presume that that vote was cast after due deliberation. I therefore agree that the Award must, for the reasons set out in the Judgment of the Court, be treated in law as a majority award and that the plea of "inexistence" taken by Guinea-Bissau should fail. I would agree further that, despite the President's apparent view that a more precise formulation of the Award would have opened the way for a consideration of Question 2, the decision not to address Question 2 was a majority decision by reason of the President being a party to it. Weakened though it may be by the declaration, that decision is still a majority decision and cannot in law be described as "inexistent" on the basis that the President's declaration destroys his vote.

However, for reasons which will be evident from this opinion, the decision so given is fundamentally flawed by reason of other defects, and is therefore in my view a nullity.

This opinion is structured in two main segments. The first deals with the interpretation of Article 2 of the *compromis* and the second examines whether the findings thus reached result in the nullity of the Arbitral Award. For the reasons set out, I conclude upon the first matter that a proper interpretation of Article 2 did not permit the Tribunal to leave a major portion of its responsibilities undischarged. On the second matter, my conclusion is that the failure to discharge those responsibilities constituted a non-compliance with the *compromis* which was so serious as to nullify the resulting award.

Before entering upon these major questions of law, I should state preliminarily as a matter of fact that the dispute between the two countries was a dispute in relation to their maritime boundary and that there were five maritime spaces which needed to be demarcated — the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone and the fishery zone. The dispute between the two States would not be at an end so long as any of these important maritime spaces remained undefined.

I. INTERPRETATION OF ARTICLE 2 OF THE *COMPROMIS*

The particular clause which arises for interpretation is Article 2 of the Arbitration Agreement of 12 March 1985, which reads as follows:

> "The Tribunal is requested to decide in accordance with the norms of international law on the following questions:

celui-ci à dire dans son opinion dissidente que la déclaration, «par son existence autant que par son contenu, justifie de s'interroger plus fondamentalement sur l'existence d'une majorité et la réalité de la sentence» (par. 161).

Malgré les interrogations que suscitent ces éléments, je suis disposé à m'associer au point de vue de la Cour selon lequel c'est le vote du président plus que sa déclaration quelque peu contradictoire qui doit être pris en compte. On doit présumer que le vote a eu lieu après due délibération. Je conviens donc, pour les motifs énoncés dans l'arrêt de la Cour, que la sentence doit être considérée en droit comme une décision de la majorité et que l'argument d'«inexistence» invoqué par la Guinée-Bissau ne doit pas être accueilli. Je conviens en outre que, bien que le président ait semblé penser qu'une formulation plus précise de la sentence aurait ouvert la porte à l'examen de la seconde question, la décision de ne pas traiter la seconde question a été prise à la majorité puisque le président y a pris part. Pour affaiblie qu'elle puisse être par la déclaration du président, la décision rendue demeure une décision de la majorité et ne peut juridiquement être considérée comme «inexistante» au motif que la déclaration du président aurait annihilé son vote.

Néanmoins, pour des raisons qui apparaîtront évidentes à la lecture de la présente opinion, la décision qui a été rendue est fondamentalement viciée du fait d'autres facteurs, et est donc à mon avis entachée de nullité.

La présente opinion comporte essentiellement deux volets. Le premier concerne l'interprétation de l'article 2 du compromis et le second le point de savoir si les conclusions ainsi tirées aboutissent à la nullité de la sentence arbitrale. Pour les motifs indiqués, j'estime, en ce qui concerne la première question, qu'une interprétation correcte de l'article 2 n'autorisait pas le Tribunal à ne pas s'acquitter d'une part importante de ses responsabilités. S'agissant de la seconde question, ma conclusion est que ce manquement du Tribunal à ses responsabilités constitue une inobservation du compromis suffisamment grave pour que la sentence rendue soit nulle.

Avant d'aborder ces importants points de droit, je voudrais, à titre préliminaire, souligner une question de fait, qui est que le différend entre les deux pays portait sur leur frontière maritime et qu'il y avait cinq espaces maritimes à délimiter: la mer territoriale, la zone contiguë, le plateau continental, la zone économique exclusive et la zone de pêche. Le différend entre les deux Etats ne serait pas clos tant que l'un ou l'autre de ces importants espaces maritimes resterait indéterminé.

I. INTERPRÉTATION DE L'ARTICLE 2 DU COMPROMIS

La disposition qui soulève une question d'interprétation est l'article 2 du compromis d'arbitrage conclu le 12 mars 1985, qui se lit comme suit:

> «Il est demandé au Tribunal de statuer conformément aux normes du droit international sur les questions suivantes:

> 1. Does the Agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?
>
> 2. *In the event of a negative answer to the first question*, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively?" (Annex to the Application Instituting Proceedings of the Government of the Republic of Guinea-Bissau, Award, p. 5; emphasis added.)

The crucial words are "In the event of a negative answer to the first question", on the interpretation of which considerable effort was expended by both Parties at the hearing before us. On the interpretation of those words depends the issue whether the Arbitration Tribunal was under an obligation to proceed to answer Question 2. If the Tribunal was entitled to leave Question 2 unanswered, the matter is at an end and we need enquire no further. If, on the other hand, the Tribunal was obliged to answer Question 2 and failed to do so, grave issues arise. They touch the status and validity of an award which left major portions of the arbitrators' responsibilities undischarged, thereby leaving major portions of the boundary dispute unresolved. The words quoted offer the key to the resolution of this central question.

Focusing even more finely on the clause under consideration, what is the meaning of the phrase "negative answer"? Those two words are naturally incapable of construction except in context — the context of the paragraph in which they occur and the context of the entire document. The conclusion, which to me seems inevitable on any of the available methods of interpretation as set out in this opinion, is that the "negative answer" referred to was a negative answer to the question whether the 1960 Agreement was binding in regard to the subject-matter of the dispute — not any one or more component elements thereof but the disputed boundary considered as one integral problem, the desire to settle which was the driving force leading the Parties to the Arbitration Tribunal.

An incomplete settlement, dealing only with discrete parts of that boundary, would only compound problems and was clearly not the object and purpose of the Arbitration Agreement, in the total context of which alone particular clauses are to be construed. The different elements of the boundary question were not, on any reasonable construction, to be the subject of a later arbitration or arbitrations aimed at mopping up the component elements left undetermined by the first arbitration. Partial answers and piecemeal solutions were furthest from the object and purpose of the *compromis*. The interlinked nature of those component elements, which can-

1. L'accord conclu par un échange de lettres, le 26 avril 1960, et relatif à la frontière en mer, fait-il droit dans les relations entre la République de Guinée-Bissau et la République du Sénégal?

2. *En cas de réponse négative à la première question*, quel est le tracé de la ligne délimitant les territoires maritimes qui relèvent respectivement de la République de Guinée-Bissau et de la République du Sénégal?» (Annexe à la requête de la République de Guinée-Bissau, sentence, p. 5; les italiques sont de moi.)

Les mots essentiels sont: «En cas de réponse négative à la première question», pour l'interprétation desquels les deux Parties ont déployé des efforts considérables au cours de la procédure orale devant la Cour. En effet, de l'interprétation de ce membre de phrase dépend la réponse à la question de savoir si le Tribunal arbitral était dans l'obligation de répondre à la seconde question. Si le Tribunal était habilité à laisser la seconde question sans réponse, l'affaire est close et il n'est pas nécessaire d'aller plus loin. Si, par contre, le Tribunal était dans l'obligation de répondre à la seconde question et a failli à cette obligation, de graves questions se posent. Elles ont trait au statut et à la validité d'une sentence qui laisse sans exécution des éléments essentiels du mandat des arbitres et de ce fait ne résout pas des éléments essentiels du différend frontalier. Les mots cités donnent la clé de la résolution de cette question centrale.

Examinons de plus près encore la disposition en question et interrogeons-nous sur le sens des mots «réponse négative». Ces deux mots ne peuvent naturellement être interprétés que dans leur contexte — le contexte du paragraphe où ils se trouvent et le contexte de l'ensemble du document. La conclusion, qui me semble s'imposer si l'on applique l'une quelconque des méthodes d'interprétation présentées dans la présente opinion, est que «réponse négative» doit s'entendre d'une réponse négative à la question de savoir si l'accord de 1960 fait droit en ce qui concerne l'objet du différend — c'est-à-dire non tel ou tel élément, ou plusieurs éléments constitutifs de ce dernier, mais le différend frontalier considéré comme un problème global, le désir de parvenir à un règlement de ce problème ayant été l'élément moteur qui a conduit les Parties devant le Tribunal arbitral.

Un règlement incomplet, qui ne concernerait que certains éléments de la frontière, ne ferait qu'aggraver le problème et n'était manifestement ni l'objet ni le but du compromis d'arbitrage, dans le seul contexte duquel les dispositions doivent être interprétées. Selon toute interprétation raisonnable, les différents éléments de la question frontalière ne devaient pas faire l'objet d'un ou de plusieurs arbitrages ultérieurs destinés à résorber les questions qui n'auraient pas été tranchées par le premier arbitrage. Des réponses partielles et des solutions fragmentaires étaient tout à fait à l'opposé de l'objet et du but du compromis. Le caractère indissociable des

not fairly be determined in isolation from each other, lends strength to the view that both Parties were clearly seeking such a comprehensive settlement of their common problem in one arbitration.

I proceed to set out the reasons for my view that a complete delimitation was the subject-matter of Question 1.

Question 1 — to which it was crucial whether the answer was negative or not — asked whether the Agreement of 26 April 1960 had the force of law in the relations *(dans les relations)* between Guinea-Bissau and Senegal. It is true the expression "the relations" is a very simple phrase. Interpreted in isolation, it can be given many meanings, extending from all relations between the States to maritime boundary relations and, within the latter category, to a wide spectrum of relations ranging from all the disputed maritime boundary questions to any one or more components of them or, indeed, to any portion of any one component. Context and objects and purposes will tell us where in that vast spectrum our choice will fall. Indeed, without reference to these factors, we cannot give the phrase a meaning sufficiently intelligible or definite for the momentous legal consequences to ensue which follow inevitably from our choice.

Question 1 was not, in my view, a theoretical question referring only to the binding nature of the 1960 Agreement. It was a question on which grave practical issues turned — namely whether the boundary followed the line determined in that Agreement. The boundary line lay at the heart of that question as it lay at the heart of Question 2 which, together with Question 1, I have described in this opinion as an interlocking pair.

We can straightaway dismiss the wider construction extending "the relations" to all relations between the States, for clearly the document was set firmly in the context of the relations concerning the maritime boundaries, as the internal evidence even within Question 1 indicates. The crucial question is however whether the expression relates to all the maritime boundary questions or to any one or more constituent elements of this group. On this matter it seems clear that, whether one regards the context of the document or its objects and purposes, it was never in doubt that "the relations" covered all five elements of the maritime boundary.

If the view is correct that the question was whether the Agreement was binding in regard to the entire maritime boundary, an answer that it was binding, not in regard to the entirety but only in regard to parts of it, was clearly a negative answer, upon which the door to Question 2 immediately swung open. This made it obligatory for the Tribunal to enter upon a consideration of the important issues awaiting it under that question — issues that represented a substantial part of the Tribunal's total undertaking. The failure by the Tribunal to address a crucial part of its responsibilities

composantes du différend, qui ne peuvent être équitablement déterminées séparément les unes des autres, étaie l'argument selon lequel les deux Parties voulaient manifestement obtenir un règlement global de leur problème commun par un seul arbitrage.

Je vais à présent exposer les motifs pour lesquels, selon moi, le contenu de la première question concernait une délimitation complète.

La première question — dont il est capital de savoir si elle appelait une réponse négative ou non — tendait à déterminer si l'accord conclu le 26 avril 1960 faisait droit dans les relations entre la Guinée-Bissau et le Sénégal. Il est vrai que l'expression « les relations » est très succincte. Interprétée isolément, on peut lui prêter de nombreux sens, et la comprendre comme signifiant aussi bien toutes les relations entre les Etats que les relations concernant la frontière maritime et, dans le cadre de ce dernier sens, lui attribuer un large éventail de significations, allant de relations en ce qui concerne l'ensemble des litiges relatifs à la frontière maritime ou seulement un ou plusieurs éléments de ces litiges, voire même un aspect de tel ou tel de ces éléments. Le contexte, l'objet et le but nous permettront de dire où, dans ce large éventail, notre choix devra se porter. En effet, sans prendre en compte ces facteurs, il n'est pas possible de donner à l'expression un sens suffisamment intelligible ou précis pour qu'on puisse en tirer les conséquences juridiques fondamentales qui découleront inévitablement de notre choix.

Personnellement, je ne pense pas que la première question était une question théorique portant seulement sur le caractère obligatoire de l'accord de 1960. Elle portait sur un point qui avait des incidences pratiques capitales, c'est-à-dire celui de savoir si la frontière suivait la ligne définie dans l'accord. La ligne frontière était au cœur de cette question, tout comme elle était au cœur de la seconde, laquelle, avec la précédente, forme ce que j'appellerai une paire inséparable.

Nous pouvons d'emblée écarter l'interprétation la plus large qui donne aux mots « les relations » le sens de toutes les relations entre les Etats, car il est clair que le document a été nettement situé dans le contexte des relations concernant la frontière maritime, comme en témoigne le contenu même de la première question. L'essentiel est néanmoins de savoir si l'expression vise toutes les questions relatives à la frontière maritime ou bien l'un ou l'autre ou plusieurs de ses éléments constitutifs. A cet égard, que l'on considère le contexte du document ou son objet et son but, il ne semble faire aucun doute que les mots « les relations » recouvraient l'ensemble des cinq éléments de la frontière maritime.

S'il est exact que la question était de déterminer si l'accord faisait droit en ce qui concerne la totalité de la frontière maritime, répondre que l'accord faisait droit non pour la totalité de la frontière mais seulement pour certains de ses éléments était manifestement une réponse négative, qui ouvrait immédiatement la porte à la seconde question. Le Tribunal était dès lors tenu d'examiner les points importants se posant dans le cadre de cette question, points qui correspondaient à une part substantielle de son mandat. Le fait que le Tribunal ne s'est pas acquitté d'une

under the *compromis* raises the further issue whether the Award is vitiated for non-compliance with the *compromis*.

Bearing in mind throughout this exercise that we are not entitled to reconstitute the questions formulated by the Parties, but only to interpret them exactly as formulated, we must satisfy ourselves further that, in all the circumstances, this is the necessary and only interpretation at which the arbitrators could reasonably arrive when examining them for the purpose of determining their arbitral responsibilities.

These considerations are important as we are not sitting as a Court of Appeal seeking to determine whether to nullify an award that would otherwise be valid. We have jurisdiction only for the purpose of making a declaration as to whether the award is null and void from its inception in consequence of some fundamental flaw. An interpretation manifestly contrary to accepted principles of interpretation and leading to action manifestly contrary to the *compromis* would constitute such a vitiating factor. This opinion proceeds on the basis that no less a standard than this would be required if the Court is to grant to Guinea-Bissau the declaration of nullity which it seeks.

It is vitally important that when arbitrators examine, as in every case they must, with the utmost care, the substance of their mandate and the limits of their authority, their interpretation must be anchored to the realities of the context. Words and phrases in the *compromis* are not to be treated as though they exist in isolation, to be given a meaning they are literally capable of bearing but which is unrelated to the exercise in which the arbitrators are engaged.

In this case, the phrase "negative answer" was of the utmost importance and called for anxious scrutiny. Yet there is nothing to indicate that the Tribunal has given to this key phrase the scrutiny its importance demanded, and all we have on this matter is the observation in paragraph 87 of the Award that, bearing in mind its conclusions (on the applicability of the 1960 Agreement) and "the actual wording" of Article 2, "in the opinion of the Tribunal it is not called upon to reply to the second question". What factors weighed with them we are not told, beyond the fact that this was their opinion. It would not be unreasonable to describe this as inadequate — certainly inadequate to convey to an objective observer the impression that anxious consideration had been given to construing this profoundly important question in its contextual and practical setting.

The analysis of this phrase, which assumes a pivotal role in the matter before us, takes us into the realm of treaty interpretation, the *compromis* being of course a treaty. The discussion which immediately follows analyses the relevant portions of the *compromis* in the light of accepted principles of treaty interpretation.

part essentielle de ses responsabilités en vertu du compromis soulève alors une autre question, celle de savoir si la sentence est viciée en raison d'une inobservation du compromis.

Gardant présent à l'esprit tout au long de cette réflexion que nous ne sommes pas habilités à reconstituer les questions formulées par les Parties, mais seulement à les interpréter dans la forme exacte où elles ont été formulées, nous devons en outre nous assurer, pour déterminer en analysant les questions posées comment les arbitres se sont acquittés de leurs responsabilités, qu'en tout état de cause notre interprétation est bien la seule interprétation possible et nécessaire à laquelle les arbitres pouvaient raisonnablement aboutir.

Ces considérations sont importantes car nous ne siégeons pas en qualité de cour d'appel statuant sur le point de savoir si une sentence qui serait autrement valide doit être annulée. La Cour a seulement compétence pour dire si la sentence est nulle et de nul effet *ab initio* en conséquence d'un vice essentiel. Une interprétation manifestement contraire aux principes d'interprétation établis et conduisant à une décision manifestement contraire au compromis serait un élément constitutif d'un tel vice. La présente opinion part du principe que cela et rien de moins serait nécessaire pour que la Cour prononce la déclaration de nullité demandée par la Guinée-Bissau.

Il est capital qu'en examinant avec le plus grand soin, comme ils doivent le faire dans chaque espèce, la substance de leur mandat et les limites de leur compétence, les arbitres ancrent leur interprétation dans les réalités du contexte. Il ne faut pas considérer les mots et expressions du compromis isolément, afin de leur donner un sens littéral possible mais sans rapport avec la mission des arbitres.

En l'occurrence, les mots « réponse négative » étaient de la plus haute importance et appelaient un examen très attentif. Pourtant, rien n'indique que le Tribunal a accordé à ces mots clés l'attention que leur importance exigeait; on ne peut sur ce point se référer qu'au paragraphe 87 de la sentence dans lequel le Tribunal explique qu'en tenant compte des conclusions (sur l'applicabilité de l'accord de 1960) et du « libellé » de l'article 2, « la deuxième question, de l'avis du Tribunal, n'appelle pas une réponse de sa part ». Hormis le fait que tel est l'avis du Tribunal, rien n'est dit des facteurs qui ont pesé dans la décision. On pourrait sans exagérer dire que cela est insuffisant, et certainement insuffisant pour qu'un observateur objectif puisse avoir l'impression que le Tribunal n'avait négligé aucun effort pour interpréter cette question essentielle compte tenu de son contexte et de ses incidences pratiques.

L'analyse de ce membre de phrase, qui joue un rôle charnière dans la question qui nous occupe, nous fait entrer dans le domaine de l'interprétation des traités, le compromis étant bien évidemment un traité. J'examinerai ci-après les parties pertinentes du compromis à la lumière des principes établis de l'interprétation des traités.

Sir Gerald Fitzmaurice, in his well-known discussion of treaty interpretation [1], refers to the existence of three principal schools of thought upon the subject — the "intentions of the parties" school, the "textual" school and the "teleological" school [2]. The term "teleological" is used by Fitzmaurice *(loc. cit.)* in the sense of "aims and objects" of the treaty.

I shall in this opinion apply these approaches to the problem before us, mindful that a hierarchy cannot be established among them [3].

Having referred to the three principal schools of interpretation and the radically divergent results that could ensue from their application, Fitzmaurice observes (at p. 43) that "all three approaches are capable, in a given case, of producing the same result in practice". In this case we are, in my view, in the happy situation alluded to by Fitzmaurice, where all three approaches concur in leading us to the same conclusion. I shall use these three methods in the ensuing discussion without placing them in any hierarchical order. As Judge Elias [4] points out, none of these by itself may be sufficient to supply the solution to a problem of treaty interpretation and there may sometimes be a simultaneous resort to all three factors, as indicated by the Permanent Court of International Justice in the *Factory at Chorzów* case (*P.C.I.J., Series A, No. 9*, p. 24).

A. The "Textual" Approach

That words should be given their ordinary meaning is of course a much-used rule of interpretation. As this Court stated in its Advisory Opinion in *Competence of the General Assembly for the Admission of a State to the United Nations:*

> "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur." [5]

The Permanent Court of International Justice has observed:

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[1] Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. 1, p. 42.

[2] See, also, T. O. Elias, *The Modern Law of Treaties*, 1974, p. 72.

[3] Commentary on the Draft Articles on the Law of Treaties by the International Law Commission at its Eighteenth Session — *United Nations Conference on the Law of Treaties, Official Records (First and Second Sessions)*, 1971, p. 39, para. 8; see, also, Myres S. McDougal, Harold Lasswell and James Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure*, 1967, p. 116.

[4] *Op. cit.*, p. 72.

[5] *I.C.J. Reports 1950*, p. 8; see, also, Advisory Opinion on the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, I.C.J. Reports 1960*, p. 150.

Dans son analyse bien connue de l'interprétation des traités[1], sir Gerald Fitzmaurice mentionne les trois principales écoles de pensée sur le sujet, l'école qui vise à donner effet à l'« intention des parties », l'école « textuelle » et l'école « téléologique »[2]. Pour Fitzmaurice *(loc. cit.)*, le mot « téléologique » désigne « le but et l'objet » du traité.

Dans la présente opinion, j'appliquerai ces approches au problème qui nous occupe, conscient du fait qu'il n'est pas possible d'établir une hiérarchie entre elles[3].

Après avoir présenté les trois principales approches en matière d'interprétation et indiqué les conclusions foncièrement divergentes qui peuvent en découler, Fitzmaurice observe (à la page 43) que « les trois approches peuvent, dans un cas déterminé, aboutir au même résultat pratique ». A mon avis, nous sommes en l'occurrence dans l'heureuse situation envisagée par Fitzmaurice, celle où les trois approches concourent à la même conclusion. Dans l'analyse qui va suivre, j'appliquerai ces trois méthodes hors de tout classement hiérarchique. Comme T. O. Elias[4] le fait remarquer, chacune de ces méthodes d'interprétation peut ne pas être à elle seule suffisante pour donner la solution à un problème concernant l'interprétation d'un traité et il y a quelquefois lieu d'appliquer simultanément les trois approches, comme l'a indiqué la Cour permanente de Justice internationale dans l'affaire de l'*Usine de Chorzów* (*C.P.J.I. série A/B n° 9*, p. 24).

A. L'approche « textuelle »

La règle d'interprétation selon laquelle il faut donner aux mots leur sens ordinaire est naturellement largement employée. Comme l'a déclaré la Cour dans son avis consultatif dans l'affaire de la *Compétence de l'Assemblée générale pour l'admission d'un Etat aux Nations Unies*:

> « La Cour croit nécessaire de dire que le premier devoir d'un tribunal, appelé à interpréter et à appliquer les dispositions d'un traité, est de s'efforcer de donner effet, selon leur sens naturel et ordinaire, à ces dispositions prises dans leur contexte. »[5]

La Cour permanente de Justice internationale a fait observer:

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[1] Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. 1, p. 42.

[2] Voir aussi T. O. Elias, *The Modern Law of Treaties*, 1974, p. 72.

[3] Commentaires sur le projet d'articles sur le droit des traités par la Commission du droit international à sa dix-huitième session, *Conférence des Nations Unies sur le droit des traités, Documents officiels (première et deuxième session)*, 1971, p. 42, par. 8; voir aussi Myres S. McDougal, Harold Lasswell et James Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure*, 1967, p. 116.

[4] *Op. cit.*, p. 72.

[5] *C.I.J. Recueil 1950*, p. 8. Voir également l'avis consultatif sur la *Composition du Comité de la sécurité maritime de l'Organisation intergouvernementale consultative de la navigation maritime, C.I.J. Recueil 1960*, p. 150.

> "In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense." [1]

Since then, the Vienna Convention on Treaties has given this principle more explicit form in Article 31.

Words and phrases cannot be understood by themselves, and, as Article 31 makes clear, their "ordinary meaning" must be understood not in isolation but in their context *and* in the light of the document's object and purpose. Judge Ago emphasized this aspect in the deliberations of the International Law Commission [2] when, in commenting on the concept of "ordinary meaning", he observed that:

> "a term in isolation had no meaning; terms had no meaning except in a sentence or in a set of sentences and articles, in other words, in their context".

We have moved far from the Vattelian principle that "the first general rule of interpretation is that *it is not permissible to interpret what has no need of interpretation*" [3]. Though followed by some eminent international jurists even into the early years of this century, the need for even the simplest words to require some interpretation has been highlighted both by legal scholars [4] and by modern linguistic studies. The impact of the latter is seen in such studies as Schwarzenberger's analysis of the Vienna Convention [5], in which, in reliance on linguistic studies, he points out that the very word "meaning" can have up to sixteen meanings and that the difficulty in seeking to give words their "ordinary meaning" is that "almost any word has more than one meaning" (citing in support such well-known authorities as C. K. Ogden, *The Meaning of Meaning*). Hence, as McNair points out in his *Law of Treaties* (1961, p. 367), even the best understood of "plain terms" such as "mother" can depart very widely from its normal meaning,

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[1] Advisory Opinion on the *Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture (P.C.I.J., Series B, No. 2*, p. 23).

[2] *Yearbook of the International Law Commission*, 1966, Vol. I, Part II, p. 189, para. 57.

[3] Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law*, Vol. III, Bk. II, Chap. XVII, in *The Classics of International Law*, ed. J. B. Scott, p. 199; emphasis added.

[4] See E. S. Yambrusic, *Treaty Interpretation: Theory and Reality*, 1987, pp. 9 *et seq.*

[5] "Myths and Realities of Treaty Interpretation: Articles 31-33 of the Vienna Convention on the Law of Treaties", in S. K. Agrawala (ed.), *Essays on the Law of Treaties*, p. 71, at p. 86.

> « Pour examiner la question actuellement pendante devant la Cour à la lumière des termes mêmes du traité, il faut évidemment lire celui-ci dans son ensemble, et l'on ne saurait déterminer sa signification sur la base de quelques phrases détachées de leur milieu et qui, séparées de leur contexte, peuvent être interprétées de plusieurs manières. »[1]

Depuis lors, la convention de Vienne sur le droit des traités a exprimé ce principe de manière plus explicite dans son article 31.

Les mots et les phrases ne peuvent être compris par eux-mêmes et, comme l'indique clairement l'article 31, il faut leur attribuer leur « sens ordinaire », non pris isolément, mais dans leur contexte *et* à la lumière de l'objet et du but du texte. M. Ago a insisté sur cet aspect au cours des délibérations de la Commission du droit international[2], faisant observer, dans ses commentaires sur la notion de « sens ordinaire », que:

> « des termes isolés ne signifient rien; les termes n'ont de sens que dans une phrase, dans un ensemble de phrases et d'articles, c'est-à-dire, dans leur contexte ».

Nous sommes loin du principe énoncé par Vattel selon lequel « la première règle générale d'interprétation est qu'*il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation* »[3]. Bien que ce principe ait été encore suivi par d'éminents spécialistes du droit international jusqu'au début du siècle, la nécessité de donner une certaine interprétation même aux mots les plus simples a été soulignée à la fois par des auteurs[4] et par des études linguistiques de l'époque moderne. L'influence de ces dernières est sensible par exemple dans l'analyse de la convention de Vienne de Schwarzenberger[5], lequel souligne, en s'appuyant sur des études linguistiques, que le mot « sens » lui-même peut avoir jusqu'à seize sens et qu'il est difficile de chercher à donner aux mots leur « sens ordinaire » parce que « pratiquement chaque mot à plus d'un seul sens » (il cite à l'appui de ses dires des autorités aussi renommées que C. K. Ogden, auteur de *The Meaning of Meaning*). Ainsi, comme le fait remarquer

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[1] Avis consultatif sur la *Compétence de l'OIT pour la réglementation internationale des conditions du travail des personnes employées dans l'agriculture, C.P.J.I. série B nos 2 et 3*, p. 22.

[2] *Annuaire de la Commission du droit international*, 1966, vol. I, deuxième partie, p. 209, par. 57.

[3] Emmerich de Vattel, *Le droit des gens ou principes de la loi naturelle*, vol. III, livre II, chap. XVII, dans *The Classics of International Law*, publié sous la direction de J. B. Scott, p. 199; les italiques sont de moi.

[4] Voir E. S. Yambrusic, *Treaty Interpretation: Theory and Reality*, 1987, p. 9 et suiv.

[5] « Myths and Realities of Treaty Interpretation: Articles 31-33 of the Vienna Convention on the Law of Treaties », dans S. K. Agrawala (publié sous la direction de), *Essays on the Law of Treaties*, p. 86.

depending on the context in which it is used [1]. Not without reason has this Court had occasion to refer [2] to the famous observation of Mr. Justice Holmes that

> "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and context according to the circumstances and the time when it is used" (*Towne* v. *Eisner*, 245 US 418, 425).

It is clear therefore that the expressions "the relations" and "negative answer" cannot be understood by themselves but only in strict relation to their context. One cannot give a meaning to these expressions without subjecting them to rigorous contextual scrutiny. Professor Glanville Williams, in a noted scholarly analysis of legal interpretation in the wider context of Language and the Law [3], follows linguistic insights to point out that

> "it is always the duty of the Court, within the limits set by the law of evidence, to go behind the dehumanized dictionary-meaning to what the assertor was actually trying to express" [4].

I may also refer to the *Anglo-Iranian Oil Co.* case, where this Court observed, in relation to the declaration by the Government of Iran, under Article 36 (2) of the Statute of this Court:

> "But the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text." (*I.C.J. Reports 1952*, p. 93, at p. 104.)

We must thus go further in examining the two phrases in question than grammatical meanings or dictionary definitions, and give the words a meaningful nexus with the real dispute reflected in the terms of the *compromis.*

(i) Contextual indications

The general context yields several indications that the Agreement between Guinea-Bissau and Senegal concerned a consolidated question

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[1] On linguistics and legal interpretation, see, also, C. G. Weeramantry, *The Law in Crisis: Bridges of Understanding*, 1975, pp. 163-167.

[2] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, at p. 360, *per* Judge Gros, dissenting.

[3] Glanville Williams, "Language and the Law", [1945] 61 *LQR* 384 at 393.

[4] Cf., Savigny, *Obligations*, 1851, Vol. 2, § 71, on the need for "making the living thought concealed in dead letters to come alive in our perception".

McNair dans son ouvrage *The Law of Treaties* (1961, p. 367), même le plus facile à comprendre des « termes simples », le mot « mère », peut avoir un sens très éloigné de son sens normal, selon le contexte dans lequel il est utilisé[1]. Ce n'est pas sans raison que la Cour a pu citer[2] la célèbre remarque de M. Holmes selon laquelle

> « un mot n'est pas un cristal, transparent et inaltéré, il recouvre une pensée vivante et sa couleur et son contenu peuvent varier selon le moment et les circonstances » (*Towne* v. *Eisner*, 245 US 418, 425).

Il est donc clair que les expressions « les relations » et « réponse négative » ne doivent pas être prises isolément mais seulement en relation étroite avec leur contexte. On ne peut leur donner un sens sans les confronter rigoureusement à leur contexte. Le professeur Glanville Williams, dans une étude théorique remarquée sur l'interprétation juridique dans le contexte plus large du langage et du droit[3], suit la linguistique pour faire valoir que,

> « dans les limites fixées par le droit de la preuve, il appartient toujours à la Cour d'aller au-delà du sens impersonnel du dictionnaire pour rechercher ce que l'énonciateur voulait en fait exprimer »[4].

Je voudrais également me référer à l'affaire de l'*Anglo-Iranian Oil Co.*, dans laquelle la Cour a observé, à propos de la déclaration faite par l'Iran conformément à l'article 36, paragraphe 2, du Statut de la Cour :

> « Mais la Cour ne saurait se fonder sur l'interprétation purement grammaticale du texte. Elle doit rechercher l'interprétation qui est en harmonie avec la manière naturelle et raisonnable de lire le texte. » (*C.I.J. Recueil 1952*, p. 104.)

Dans l'examen des deux expressions en question, nous devons donc aller au-delà de leur signification grammaticale ou des définitions du dictionnaire, et relier les mots à la substance du différend telle qu'elle est reflétée dans les termes du *compromis* pour leur donner un sens.

i) *Indices contextuels*

Il y a dans le contexte général plusieurs indices montrant que le compromis entre la Guinée-Bissau et le Sénégal portait sur une question

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[1] Sur la linguistique et l'interprétation juridique, voir aussi C. G. Weeramantry, *The Law in Crisis : Bridges of Understanding*, 1975, p. 163-167.

[2] *Délimitation de la frontière maritime dans la région du golfe du Maine, C.I.J. Recueil 1984*, p. 360, opinion dissidente de M. Gros.

[3] Glanville Williams, « Language and the Law », [1945] 61 *LQR*, p. 393.

[4] Voir Savigny, *Obligations*, 1851, vol. 2, § 71, sur la nécessité de « donner vie dans notre perception à la pensée vivante occultée dans des lettres mortes ».

and not a series of discrete questions. That question is compendiously described in the Preamble to the *compromis* as "the dispute", which is not the language one would expect if the intention was to treat this as a series of disparate questions which may or may not be answered at the discretion of the Tribunal. Internal evidence to this effect from the text of the treaty can be gathered from at least five sources:

(a) Paragraph 2 of the Preamble speaks of the recognition by the Parties that they have been unable to settle by means of diplomatic negotiation *the* dispute relating to the determination of their maritime boundary.

(b) Paragraph 3 of the Preamble follows up this reference to "the dispute" by speaking of the desire of the Parties, in view of their friendly relations, to reach a settlement of *that* dispute, as soon as possible.

(c) Article 2, in its formulation of Question 1, speaks of *the* maritime boundary.

(d) Article 2, in its formulation of Question 2, speaks of *the* line delimiting the maritime territories.

(e) Article 9 requires the drawing of *the* boundary line on the map. *One* boundary line for all *five* disputed areas is one of the clearest pointers in the direction I have indicated.

There was thus a clear understanding on the part of the contracting Parties that the Agreement they were entering into was one seeking a delimitation of the entire boundary.

(ii) Questions 1 and 2 viewed in the context of each other

The two questions constituted an interlocking pair set within a common context — the resolution of the entire dispute. Indeed, one could even look at the questions together as a composite question in bifurcated form, with a clear end result — the resolution of the entire dispute.

Question 2 implicitly indicates that, whatever the answer to Question 1, the result should be one boundary line. Three possibilities present themselves in regard to Question 1 —

(a) an answer that the Agreement was binding in regard to all components;

(b) an answer that it was not binding in regard to any component; and

(c) an answer that it was binding only in regard to some.

Whatever the answer, the mutually desired result of a single boundary line was achieved through the juxtaposition of the two questions.

In eventuality *(a)* described above there was no problem in reaching the

globale et non sur une série de questions distinctes. Dans le préambule du compromis, cette question est succinctement décrite comme étant « le différend », ce qui n'est pas le mot que l'on attendrait si l'intention des Parties était d'y voir une série de questions disparates auxquelles le Tribunal pourrait à son gré répondre ou ne pas répondre. Cela est corroboré par au moins cinq expressions figurant dans le texte du traité :

a) aux termes du deuxième alinéa du préambule, les Parties reconnaissent n'avoir pu résoudre par voie de négociation diplomatique *le* différend relatif à la détermination de leur frontière maritime ;

b) la référence au « différend » se poursuit au troisième alinéa du préambule, qui exprime le désir des Parties, étant donné leurs relations amicales, de parvenir au règlement de *ce* différend dans les meilleurs délais ;
c) l'article 2, dans sa formulation de la première question, vise *la* frontière en mer ;
d) l'article 2, dans sa formulation de la seconde question, parle de *la* ligne délimitant les territoires maritimes ;
e) l'article 9 prévoit le tracé de *la* ligne frontière sur une carte. Le fait que le texte prévoit le tracé d'*une* ligne frontière pour les *cinq* espaces maritimes en litige est un des indices qui vont le plus nettement dans le sens que j'ai indiqué.

Les Parties contractantes étaient donc clairement convenues que l'accord qu'elles concluaient visait à obtenir une délimitation de la frontière dans son ensemble.

ii) *La première et la seconde question considérées l'une par rapport à l'autre*

Les deux questions constituaient une paire inséparable placée dans un contexte commun, à savoir le règlement de l'intégralité du différend. On pourrait même considérer les deux questions ensemble, comme une seule question à deux branches tendant à parvenir à un résultat bien précis, le règlement de l'intégralité du différend.

La seconde question laisse entendre implicitement que, quelle que soit la réponse donnée à la première question, une seule ligne frontière doit au bout du compte être établie. La première question ouvre trois possibilités de réponses :

a) l'accord est obligatoire en ce qui concerne tous les éléments ;

b) l'accord n'est obligatoire pour aucun des éléments ;
c) l'accord n'est obligatoire qu'en ce qui concerne certains éléments.

Quelle que fût la réponse, la juxtaposition des deux questions conduisait au résultat souhaité par les deux Parties, à savoir la détermination d'une seule ligne frontière.

Dans l'hypothèse du point *a)* susmentionné, le résultat souhaité était

desired result, for the answer to Question 1 would, in that event, settle the entire problem which was to be resolved. Question 2 would in that situation become a superfluous appendage denuded of practical purpose and content. However, in eventualities *(b)* and *(c)*, Question 2 remained a live and meaningful part of the entire exercise — indeed a part without which the exercise would remain fruitless and its object languish unaccomplished. The vast amount of expense, time and trouble which the entire operation had absorbed would then turn sterile unless Question 2 was addressed. It thus remained a vital part of the Tribunal's commitment and obligation if it was to address itself truly to the object for which it was constituted — an object which could not fail to receive attention if the Tribunal's mandate was to be interpreted in accordance with the norms of international law as stipulated in the opening line of the clause under reference.

In eventualities *(b)* and *(c)* work remained to be done through Question 2 to achieve the desired complete single boundary implicit in that question, by demarcating all zones in eventuality *(b)* and the remaining zones in eventuality *(c)*.

There are thus no two parts of the document more closely grappled to each other than these two questions and neither question is capable of being viewed in isolation from the other. The rule of contextual interpretation requires not merely the picking out of isolated indicia such as are identified earlier in this opinion, but also the reading of different parts of the document consistently with each other. Sitting side by side in the *compromis*, each question supplementing and complementing the other, each defies proper interpretation except in the context of its paired companion.

Analysed in yet another way, the untenability of the Tribunal's interpretation of the phrase "negative answer" becomes apparent if one reduces hypothetically the extent of the supposedly affirmative answer given to Question 1. Would it be an affirmative answer if the Tribunal's finding had been that the Agreement was binding only in regard to, say, the territorial sea? Would it still be an affirmative answer if the Tribunal had found, for some reason, that the Agreement was binding only in regard to the first mile of the territorial sea? There comes a point at which an affirmative answer in relation to a portion of the disputed areas becomes affirmative in name but not in substance, in form but not in reality. Affirmative to however inconsequential an extent, it would be negative for purposes contemplated by the Parties. We cannot therefore assume that the mere fact of the answer being partially affirmative lifted it out of the category of the "negative answer" contemplated by the question. To accept such a proposition would be to miss the object and purpose of the exercise which was to delimit boundaries whose uncertainty as a whole was the cause of tension between two States desiring very much to have this uncertainty resolved.

atteint sans difficulté car la réponse à la première question réglait complètement le problème en cause. La seconde question était alors un appendice superflu dénué de tout contenu et de tout objet concrets. Par contre, dans les hypothèses *b)* et *c)*, la seconde question conservait tout son sens et toute sa force; sans elle, l'exercice juridique serait stérile et son objet ne serait jamais réalisé. La débauche d'argent, de temps et de dérangement qu'avait entraîné l'ensemble du processus aurait été vaine si la seconde question n'était pas traitée. La réponse à la seconde question était donc une part essentielle du mandat et des obligations du Tribunal dont il devait s'acquitter pour réaliser véritablement l'objet pour lequel il avait été constitué — objet qui ne pouvait manquer de recevoir l'attention nécessaire si l'on interprétait le mandat du Tribunal conformément aux normes du droit international, selon ce qui est stipulé au début de la disposition visée.

Dans les hypothèses *b)* et *c)*, il restait encore à traiter la seconde question pour établir la ligne frontière complète et unique que la question implicitement prévoyait en délimitant toutes les zones dans l'hypothèse *b)* et les zones non déjà déterminées dans l'hypothèse *c)*.

Il n'y a donc pas deux parties de l'accord qui soient plus inextricalement liées l'une à l'autre que ne le sont les deux questions et aucune d'elles ne peut être considérée sans l'autre. L'interprétation fondée sur le contexte exige non seulement que l'on identifie des indices isolés tels que ceux qui ont été cités dans la présente opinion, mais aussi que l'on lise les différentes parties du document comme constituant un tout cohérent. Les deux questions, énoncées côte à côte dans le compromis, chacune complétant l'autre, ne peuvent se prêter séparément à une interprétation exacte à moins que chacune ne soit considérée dans le contexte de la compagne qui lui est associée.

D'un autre point de vue encore, il apparaît que l'interprétation donnée par le Tribunal à l'expression « réponse négative » est insoutenable si l'on réduit hypothétiquement la portée de la réponse censément affirmative apportée à la première question. S'agirait-il d'une réponse affirmative si le Tribunal était parvenu à la conclusion que l'accord faisait droit entre les Parties en ce qui concerne, par exemple, la seule mer territoriale? S'agirait-il toujours d'une réponse affirmative si le Tribunal avait décidé, pour tel ou tel motif, que l'accord ne faisait droit qu'en ce qui concerne le premier mille de la mer territoriale? Il arrive un moment où une réponse affirmative sur une partie des territoires en litige est affirmative par son nom mais non par son contenu, dans sa forme mais non dans sa réalité. Une réponse affirmative sur des points sans conséquence n'en serait pas moins négative au regard du but poursuivi par les Parties. Nous ne pouvons donc supposer que, du seul fait qu'elle est partiellement affirmative, la réponse n'est pas une « réponse négative » au sens de la question. L'admettre serait passer à côté de l'objet et du but de l'exercice, qui étaient de délimiter des frontières dont l'incertitude, pour ce qui était de tous leurs éléments, était à l'origine de tensions entre deux Etats qui souhaitaient vivement que cette incertitude soit levée.

A view which left the Tribunal free, on the basis of such supposedly affirmative answers, to shut the door on the vital issues awaiting it under Question 2, would reduce the whole concept of this solemn international arbitration to an empty exercise, by leaving the Parties with a partial solution and sending them to all the expense, inconvenience and delay of another determination. As will be seen later in this opinion, it even throws doubts upon the validity of the partial solution. It illustrates the danger of reading words picked out of Question 2 in isolation, rather than of looking upon Questions 1 and 2 as an integrally related entity aimed at a resolution of the matters in issue between the Parties.

Such restricted views of the obligations attendant on arbitration cannot constitute a true discharge of arbitral responsibilities and are so far a departure from their very *raison d'être* that I do not think they can be viewed as even a prima facie discharge of arbitral duty. Where this Court has the opportunity to register its concern at such an attenuation of the arbitral process, I believe it should do so. Else, not only in this case but in important arbitrations yet unconceived, literal interpretations of arbitral responsibility unrelated to context may cause the vast effort and expense involved in complex proceedings to trickle away into futility. This will involve not only great cost to the parties but also damage to the prestige and authority of the international arbitral process.

B. The "Intentions" Approach

I here use the "intentions" approach through textual analysis of objects and purposes and through the positions formulated by the Parties themselves. An analysis according to the "intentions" approach powerfully confirms the contextual interpretation outlined above. A strong endorsement of this approach by Sir Hersch Lauterpacht bears repetition in this context:

> "It is the intention of the authors of the legal rule in question — whether it be a contract, a treaty or a statute — which is the starting point and the goal of all interpretation." [1]

Indeed, intention is so significant that the importance of even text and context in interpretation has been attributed by some [2] to the fact that the text is the primary evidence of what the parties had intended. In McNair's

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[1] *British Year Book of International Law*, Vol. 26 (1949), p. 83.

[2] See Waldock, Third Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1964, Vol. II, p. 56.

Si l'on admettait que le Tribunal était libre, sur la base de réponses prétendument affirmatives, de fermer la porte à l'examen des points essentiels posés par la seconde question, l'idée même d'un arbitrage international solennel serait ramenée à celle d'un exercice à vide, qui ne fournirait aux Parties qu'une solution partielle et les exposerait aux dépenses, aux complications et aux retards d'une autre détermination de frontière. Comme il sera expliqué ultérieurement dans la présente opinion, une telle solution jette même des doutes sur la validité de la réponse partielle. Elle démontre combien il est dangereux de prendre isolément des mots tirés de la seconde question plutôt que de considérer les première et seconde questions comme un tout intrinsèquement lié tendant à un règlement des points en litige entre les Parties.

Une conception aussi restrictive des obligations en matière d'arbitrage ne permettrait pas à un tribunal de s'acquitter pleinement de ses responsabilités arbitrales et elle s'écarte à tel point de la raison d'être même de l'arbitrage que, selon moi, elle ne permettrait même pas un accomplissement *prima facie* des attributions d'un tribunal arbitral. Puisque la Cour a l'occasion d'exprimer sa préoccupation devant un tel affaiblissement du processus arbitral, j'estime qu'elle devrait le faire, faute de quoi, dans la présente espèce comme dans les importants arbitrages à venir, une interprétation littérale et isolée du contexte des termes définissant la compétence arbitrale peut avoir pour conséquence que beaucoup d'efforts et d'argent seront dépensés en pure perte dans des procédures complexes. Cela représentera de grands frais pour les parties mais également portera atteinte au prestige et à l'autorité de l'arbitrage international.

B. L'approche fondée sur l'« intention » des Parties

J'appliquerai maintenant l'approche qui prend en compte l'« intention » des Parties à travers l'analyse textuelle de l'objet et du but et à travers les positions formulées par les Parties elles-mêmes. Une telle approche confirme nettement l'interprétation fondée sur le contexte présentée plus haut. Il n'est pas inutile à ce propos de rappeler que sir Hersch Lauterpacht était un ferme partisan de cette approche :

> « C'est l'intention des auteurs de la règle de droit en question — qu'il s'agisse d'un contrat, d'un traité ou d'une loi — qui est le point de départ et l'objectif de toute interprétation. »[1]

En fait, l'intention a une importance telle que certains juristes[2] ont attribué la place que doivent occuper le texte et le contexte dans l'interprétation au fait que le texte est la preuve première de l'intention des parties.

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[1] *British Year Book of International Law*, vol. 26 (1949), p. 83.

[2] Voir Waldock, troisième rapport sur le droit des traités, *Annuaire de la Commission du droit international*, 1964, vol. II, p. 57.

words [1], "the true duty of the judge is to search for the common intention of the parties in using the language of the text".

Sir Gerald Fitzmaurice's succinct summary of the general principles deriving from the major theories of treaty interpretation also emphasizes this aspect:

> "(i) The basic purpose of treaty interpretation ... is to give effect to the intentions of the parties.
>
> (ii) These intentions are presumed, *prima facie*, to be expressed in, and represented by, the terms of the treaty itself, read as an integral whole, on a basis of reason and common sense, and with due regard to the circumstances of its conclusion; but if this is not the case, or if the intention cannot be gathered from the terms with adequate certainty or sufficiency, recourse may then be had to extraneous circumstances or means...
>
> (iii) There is an underlying *general* presumption that the intention of the parties includes the intention effectively to *achieve* the intended purpose of the treaty. Hence there is warrant, *if that purpose is clear*, ...
>
> *(a)* for interpreting the treaty in such a way as will achieve that purpose rather than not achieve it;
>
> *(b)* if more than one equally valid interpretation of the text is reasonably possible, for adopting that which most effectively achieves the intended purpose; ..." [2]

Points (iv) and (v) deal with general multilateral conventions and do not concern us here.

The jurisprudence of the Court also supports the "intentions" approach as when, in the Advisory Opinion in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case, this Court stated that:

> "The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions." (*I.C.J. Reports 1951*, p. 15, at p. 23.)

The principles set out by Fitzmaurice, distilled as they are from the major theories of interpretation (and "in a form which might very possibly have been concurred in by Lauterpacht" [3]), all have applicability here. There can be no doubt of the intention of the Parties, the meaning of the treaty read as an integral whole and the interpretation that would achieve the purpose of the treaty. That interpretation is the interpretation which

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[1] *Op. cit.*, 1961, p. 373.

[2] Fitzmaurice, *op. cit.*, pp. 793-794; emphasis added.

[3] *Op. cit.*, p. 793.

Pour reprendre les termes de McNair[1], « le véritable devoir du juge est de rechercher l'intention commune des parties à travers les mots du texte ».

Dans son résumé succinct des principes généraux découlant des grandes théories de l'interprétation des traités, sir Gerald Fitzmaurice souligne également cet aspect :

> « i) L'objectif fondamental de l'interprétation des traités ... est de donner effet aux intentions des Parties.
>
> ii) Ces intentions sont présumées, *prima facie*, être exprimées et représentées par les termes du traité lui-même, lu comme un tout indivisible, sur la base de la raison et du bon sens, et compte dûment tenu des circonstances dans lesquelles il a été conclu ; mais si tel n'est pas le cas, ou si l'intention ne ressort pas des termes avec suffisamment de certitude, on peut alors avoir recours à des circonstances ou des moyens extrinsèques...
>
> iii) Il existe une présomption *générale* selon laquelle l'intention des parties inclut l'intention de *réaliser* effectivement l'objectif visé par le traité. Il est donc justifié, *si cet objectif est clair*, ...
>
> *a)* d'interpréter le traité de manière à réaliser cet objectif plutôt que de manière à ne pas le réaliser ;
>
> *b)* si plus d'une interprétation également valide du texte est raisonnablement possible, d'adopter celle qui réalise le plus efficacement l'objectif visé... »[2]

Les points iv) et v) traitent des conventions multilatérales générales et ne nous intéressent pas ici.

La jurisprudence de la Cour admet également l'approche fondée sur l'« intention » des Parties ; elle a notamment déclaré dans l'avis consultatif sur les *Réserves à la convention pour la prévention et la répression du crime de génocide* :

> « La considération des fins supérieures de la convention est, en vertu de la volonté commune des parties, le fondement et la mesure de toutes les dispositions qu'elle renferme. » (*C.I.J. Recueil 1951*, p. 23.)

Les principes énoncés par Fitzmaurice, tirés des grandes théories de l'interprétation (et exprimés « d'une manière à laquelle Lauterpacht aurait fort bien pu s'associer »[3]), sont tous applicables en l'espèce. Il ne peut y avoir de doute quant à l'intention des Parties, au sens du traité lu comme un tout indivisible et quant à l'interprétation qui permettrait de réaliser l'objectif visé par le traité. Cette interprétation est celle qui

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[1] *Op. cit.*, 1961, p. 373.

[2] Fitzmaurice, *op. cit.*, p. 793-794 ; les italiques sont de moi.

[3] *Op. cit.*, p. 793.

looks upon the treaty as embodying the will of the contracting States to secure the settlement once and for all of the maritime boundary dispute that had troubled them for so many years.

I am conscious that, in dealing with questions of interpretation, difficulties can arise not only about the meaning of terms but also from differences of attitude or frame of mind. Parties may then "be travelling along parallel tracks that never meet" to use the expressive language of Judge Fitzmaurice in the *Golder* case [1] or be speaking "on different wavelengths" [2]. In the present case, as the ensuing analysis will show, the frame of mind of both Parties, in desiring a settlement of the entire dispute, was clearly the same. To use the language of contract, they were clearly *ad idem*.

(i) The Preamble

An obvious internal source of reference is the preamble to the treaty. The preamble is a principal and natural source from which indications can be gathered of a treaty's objects and purposes even though the preamble does not contain substantive provisions. Article 31 (2) of the Vienna Convention sets this out specifically when it states that context, for the purpose of the interpretation of a treaty, shall comprise in addition to the text, the preamble and certain other materials. The jurisprudence of this Court also indicates, as in the case concerning *Rights of Nationals of the United States of America in Morocco* [3] and the *Asylum (Colombia/Peru)* case [4], that the Court has made substantial use of it for interpretational purposes. In the former case, a possible interpretation of the Madrid Convention was rejected for its lack of conformity with the preamble's specific formulation of the purposes of the Convention. In the latter case the Court used the objects of the Havana Convention, as indicated in its preamble, to interpret Article 2 of the Convention. Important international arbitrations have likewise resorted to the preamble to a treaty as guides to its interpretation [5].

The Preamble to the present *compromis* makes it transparently clear that the object of the instrument was the settlement of the entire boundary question. The two Governments, having been unable to settle by means of diplomatic negotiation *the* dispute relating to the determination of their maritime boundary, express their desire, in view of their friendly rela-

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[1] *European Court of Human Rights, Ser. A*, Vol. 18, p. 42.

[2] Sir Humphrey Waldock's words, quoted by Judge Fitzmaurice *(ibid.)*.

[3] *I.C.J. Reports 1952*, p. 176, at p. 196.

[4] *I.C.J. Reports 1950*, p. 266, at p. 282.

[5] See paras. 19 and 20, the *Beagle Channel Arbitration*, 1977, Wetter, *The International Arbitral Process*, 1979, Vol. 1, p. 276, at pp. 318-319.

considère que le traité incarne la volonté des Etats contractants d'obtenir une fois pour toutes le règlement du différend relatif à leur frontière maritime qui les avait embarrassés pendant tant d'années.

J'ai conscience que, s'agissant de questions d'interprétation, des difficultés peuvent naître non seulement d'un désaccord sur le sens des mots, mais aussi de différences d'attitude ou d'état d'esprit. Il se peut alors que les parties suivent « des chemins parallèles qui ne se rencontrent jamais », pour utiliser l'image de M. Fitzmaurice dans l'affaire *Golder*[1], ou encore qu'elles parlent « sur des longueurs d'onde différentes »[2]. En l'occurrence, comme le montrera l'analyse qui va suivre, les deux Parties souhaitaient un règlement complet du différend et avaient donc manifestement le même état d'esprit. Pour utiliser le vocabulaire des contrats, on peut dire qu'elles étaient clairement *ad idem.*

i) *Le préambule*

Le préambule d'un traité constitue à l'évidence une source de référence intrinsèque. De cette source principale et naturelle, on peut tirer des indications quant à l'objet et au but du traité, même si le préambule ne contient pas de dispositions de fond. Le paragraphe 2 de l'article 31 de la convention de Vienne énonce spécifiquement ce principe lorsqu'il indique que le contexte, aux fins de l'interprétation d'un traité, comprend non seulement le texte mais aussi le préambule et certains autres éléments. Il ressort également de la jurisprudence de la Cour, et notamment des arrêts rendus dans l'affaire relative aux *Droits des ressortissants des Etats-Unis d'Amérique au Maroc*[3] et dans l'affaire du *Droit d'asile (Colombie/Pérou)*[4], que la Cour a largement eut recours au préambule à des fins d'interprétation. Dans la première affaire, la Cour a rejeté une interprétation possible de la convention de Madrid en raison de sa non-conformité avec les buts de la convention tels qu'ils étaient spécifiquement formulés dans le préambule. Dans la deuxième affaire, la Cour s'est référée à l'objet de la convention de La Havane, tel qu'indiqué dans son préambule, pour interpréter l'article 2 de la convention. De même, d'importants arbitrages internationaux ont pris appui sur le préambule d'un traité pour guider leur interprétation[5].

Le préambule du compromis examiné révèle sans ambiguïté que l'objet du document était le règlement de la totalité du problème frontalier. Les deux gouvernements, n'ayant pu résoudre par voie de négociation diplomatique *le* différend relatif à la détermination de leur frontière maritime, expriment leur désir, étant donné leurs relations amicales, de parvenir au

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[1] *Cour européenne des droits de l'homme*, série A, vol. 18, p. 42.

[2] Sir Humphrey Waldock, cité par M. Fitzmaurice, *ibid.*.

[3] *C.I.J. Recueil 1952*, p. 196.

[4] *C.I.J. Recueil 1950*, p. 282.

[5] Voir les paragraphes 19 et 20, *Beagle Channel Arbitration*, 1977, Wetter, *The International Arbitral Process*, 1979, vol. 1, p. 318-319.

tions, to reach a settlement as soon as possible of *that* dispute. To *that end*, they have decided to resort to arbitration. They were not resorting to arbitration for a partial settlement of their dispute, which possibly was furthest from the objects and purposes of the agreement.

(ii) Parties' positions during the negotiations

Article 32 of the Vienna Convention provides that, as a supplementary means of interpretation, recourse may be had *inter alia* to the circumstances of the conclusion of the treaty *"in order to confirm the meaning resulting from the application of article 31"* (emphasis added). Using such material as is before us on this matter, but only as a supplementary means of interpretation, it is clear that this material confirms the results flowing from the contextual and the "objects and purposes" methods set out in Article 31 (1).

It is not necessary to make detailed references to the course of affairs leading to the *compromis*. It will suffice to observe that the entire course of negotiations between the Parties was conducted with the end in view that all aspects of the maritime boundary questions would be settled. The long history of disputes between the Parties ranging from 1977 to 1985 was not confined to any one aspect of the maritime boundary. It was in the interests of neither Party that the determination of the boundary or any part of it should remain in abeyance. These were the circumstances in which the agreement was reached that the matter be referred to arbitration and they strongly confirm the interpretation reached by the other approaches.

(iii) Parties' positions before the Tribunal

I do not need to elaborate here on the attitude of Guinea-Bissau whose position on this matter was never in contention. I shall concentrate rather on that of Senegal. It is clear that Senegal's position before the Tribunal was that the *entire* maritime dispute was before it and that the 1960 Agreement extended to that entire dispute, i.e., that it was not confined to the territorial sea, the contiguous zone and the continental shelf, but extended to the exclusive economic zone and fishery zone as well.

The following are among the indications of this position which can be gathered from the documents before the Court:

(a) In paragraph 53 of its Counter-Memorial submitted to the Tribunal, Senegal explains the scope of Article 2 of the Arbitration Agreement, and its contention regarding the applicability of the principles of intertemporal law to the 1960 Agreement. It then goes on to say:

> "Having made these two points, the Government of Senegal associates itself with the comment made by Guinea-Bissau, from which it

règlement de *ce* différend dans les meilleurs délais. A *cette fin*, ils ont décidé de recourir à un arbitrage. Ils n'ont pas demandé un arbitrage pour obtenir un règlement partiel de leur différend, qui aurait probablement été à l'opposé de l'objet et du but de l'accord.

ii) *Position des Parties durant les négociations*

L'article 32 de la convention de Vienne prévoit que, à titre de moyens complémentaires d'interprétation, il peut être fait appel notamment aux circonstances dans lesquelles le traité a été conclu « en vue de *confirmer le sens résultant de l'application de l'article 31* » (les italiques sont de moi). Sur la base des éléments disponibles dans la présente affaire, mais en tant que moyens complémentaires d'interprétation seulement, il est clair que ces éléments confirment la conclusion à laquelle conduisent l'interprétation fondée sur le contexte et l'interprétation fondée sur « l'objet et le but » mentionnées au paragraphe 1 de l'article 31.

Il n'est pas nécessaire de se référer dans le détail au processus qui a abouti au compromis. Il suffit de noter que tout le processus de négociation entre les Parties a été conduit dans l'optique d'un règlement de tous les aspects des questions concernant la frontière maritime. Les multiples différends qui s'étaient produits de 1977 à 1985 entre les Parties n'étaient pas limités à un aspect donné de la frontière maritime. Il n'était dans l'intérêt d'aucune des Parties que la frontière, ou une partie quelconque de celle-ci, demeure indéterminée. Telles ont été les circonstances dans lesquelles l'accord visant à ce que l'affaire soit soumise à un arbitrage a été conclu; elles confirment nettement l'interprétation résultant des autres approches.

iii) *Position des Parties devant le Tribunal*

Je ne m'attarderai pas ici sur l'attitude de la Guinée-Bissau, dont la position à cet égard n'a jamais été contestée. Je m'attacherai plutôt à expliciter celle du Sénégal. Il est clair que la position du Sénégal devant le Tribunal était que l'*intégralité* du différend maritime était soumis à ce dernier et que l'accord de 1960 couvrait la totalité de ce différend, c'est-à-dire qu'il n'était pas limité à la mer territoriale, à la zone contiguë et au plateau continental, mais s'étendait aussi à la zone économique exclusive et à la zone de pêche.

On trouve des indications de cette position dans les documents soumis à la Cour:

a) Au paragraphe 53 du contre-mémoire qu'il a présenté au Tribunal, le Sénégal explique la portée de l'article 2 du compromis d'arbitrage et expose sa position au sujet de l'applicabilité des règles intertemporelles du droit international à l'accord de 1960. Il poursuit dans les termes suivants:

> « Sous bénéfice de ces deux précisions, le Gouvernement du Sénégal s'associe au commentaire fait par la Guinée-Bissau, commentaire

> emerges: (1) that if it is accepted that the 1960 Agreement was validly concluded and is binding on the Parties, it is that Agreement alone which has the force of law concerning the maritime boundary separating *all* the maritime areas appertaining to each State, a conclusion borne out by the fact that the Parties desire a single dividing line; and (2) that the Tribunal is required itself to draw a line of separation in the sole event of a negative answer to the first question. That is what the Parties desired; the GBM [Guinea-Bissau Memorial] rightly emphasizes this." (Memorial of Guinea-Bissau in the present proceedings, Annexes, Book II; emphasis added.)

(b) In paragraph 153 of the Rejoinder of Senegal submitted to the Tribunal, Senegal avers that subsequent practice:

> "has also complemented the 1960 Agreement, giving it, as it were, an additional dimension. For it has enriched it on the 'vertical' plane, with respect to the delimitation of the superjacent water column . . . The Government of Senegal intends, indeed, to demonstrate that subsequent practice has widened the initial area of application of the Franco-Portuguese Exchange of Letters of 1960 and that the 240° maritime boundary from Cape Roxo is valid not only as limit of the sea-bed and its subsoil but also with respect to the superjacent waters." (Memorial of Guinea-Bissau in the present proceedings, Annexes, Book III.)

(c) In paragraph 245 of the same Rejoinder Senegal re-emphasizes this position:

> "In other words, while the maritime boundary established by the 1960 Agreement related, beyond the outer limit of the territorial waters, only to the continental shelves, thereby reflecting the state of the international law of the sea at the time, a considerable subsequent practice thereafter enriched and complemented the 1960 Agreement by, as it were, raising the 240° limit to the level of the surface of the superjacent waters."

(d) Paragraph 246 of the same Rejoinder reads:

> "Moreover the Government of Senegal has referred, in its Counter-Memorial, to this extension of the area of application of the 1960 Agreement, on both the spatial and the substantive plane. It has observed, in particular, that ever since Senegal's accession to independence it had 'exercised its competences, in the most varied domains, over the maritime spaces coming within its national jurisdiction and located to the north of [the 240° line]' (SCM, para. 9). It added that apart from petroleum-related activities, it had been led to 'exercise its police powers' by reference to this 240° maritime boundary . . ."

dont il ressort: 1) que s'il est admis que l'accord de 1960 a été valablement conclu et lie les Parties, c'est lui, et lui seul, qui fait droit en ce qui concerne la frontière maritime séparant l'*ensemble* des domaines maritimes relevant de chaque Etat, conclusion corroborée par le fait que les Parties souhaitent une ligne divisoire unique; et 2) que le Tribunal est appelé à tracer lui même une ligne séparatrice dans la seule hypothèse d'une réponse négative à la première question. C'est cela que les Parties ont voulu; le MGB [mémoire de la Guinée-Bissau] le souligne avec force et à juste titre.» (Mémoire de la Guinée-Bissau déposé en la présente instance, annexes, livre II; les italiques sont de moi.)

b) Au paragraphe 153 de la duplique qu'il a soumise au Tribunal, le Sénégal affirme que la pratique subséquente:

> «a également complété l'accord de 1960 et lui a en quelque sorte donné une dimension supplémentaire. Elle l'a en effet enrichi sur le plan «vertical», en ce qui concerne la délimitation de la colonne d'eau surjacente... Le Gouvernement du Sénégal entend en effet montrer que la pratique subséquente a accru la sphère d'application initiale de l'échange de lettres franco-portugais de 1960 et que la frontière en mer des 240° du cap Roxo ne vaut pas seulement comme limite du lit de la mer et de son sous-sol, mais également pour les eaux surjacentes.» (Mémoire de la Guinée-Bissau déposé en la présente instance, annexes, livre III.)

c) Au paragraphe 245 de la même duplique, le Sénégal insiste une nouvelle fois sur ce point:

> «En d'autres termes, alors que la frontière en mer établie par l'accord de 1960 ne se rapportait, au-delà de la limite extérieure des eaux territoriales, qu'aux plateaux continentaux, conformément à l'état du droit international de la mer à cette date, toute une pratique subséquente est venue enrichir et compléter l'accord de 1960 en exhaussant en quelque sorte la limite des 240° aux eaux surjacentes.»

d) Le paragraphe 246 du même document est ainsi libellé:

> «Le Gouvernement du Sénégal avait d'ailleurs fait allusion, dans son contre-mémoire, à cette extension de la sphère d'application de l'accord de 1960, sur le plan spatial comme sur le plan matériel. Il avait notamment remarqué que, dès son accession à l'indépendance, il avait «exercé ses compétences, dans les domaines les plus divers, dans les espaces maritimes relevant de sa juridiction nationale situés au nord de [la ligne des 240°]». (CMS, par. 9.) Il avait ajouté qu'en dehors des activités pétrolières, il avait été amené «à exercer ses pouvoirs de police» en se référant à cette frontière en mer des 240°...»

(e) At the hearing before the Tribunal Senegal put its position thus:

> "We observe that a dividing line — one single line and no other — comes up not just once, by chance, but constantly without any exception in the practice of these States and in the exercise of their respective jurisdictions. And what, Mr. President, is that dividing line? It is invariably the line drawn at 240° from Cape Roxo." (Memorial of Guinea-Bissau in the present proceedings, Annexes, Book IV, Part II, Verbatim Record of Oral Arguments of Senegal before the Tribunal, Record No. 9, p. 83.)

These submissions can leave no doubt that the matter which Senegal looked upon as the subject of the arbitration was the *entire* maritime boundary and no less. Its contention was that the 1960 Agreement referred to the *entire* maritime boundary and no less. The object of the arbitration was the determination of the *entire* maritime boundary and no less. Consequently Question 1, as read in its context as well as in the light of the object and purpose of the Agreement, related to the binding nature of the 1960 Agreement over the *entire* maritime boundary and no less.

Just as Senegal was urging the acceptance of the 1960 demarcation in regard to the *whole* of the maritime boundary, Guinea-Bissau was contending that it was without force in regard to the *whole* of the boundary.

Ut res magis valeat quam pereat, sometimes described as the rule of effectiveness, is another general principle of interpretation which may be invoked under the head of intention. It embodies a wisdom which is specially apposite in interpreting agreements such as this, where a concentration on the literal meaning of particular phrases may not only stifle the spirit of an agreement but also damage the harmony which that agreement was meant to promote. There is considerable warrant in the jurisprudence of this Court for applying the rule of effectiveness, though of course this principle cannot be pressed so far as to attribute to treaty provisions a meaning which would be contrary to their letter and spirit[1].

It should also be noted that the International Law Commission has taken the view that, in so far as this maxim reflects a true general rule of interpretation, it is embodied in Article 31, paragraph 1, "which requires that a treaty shall be interpreted *in good faith*" and *"in the light of its object and purpose"*[2]. The International Law Commission goes on to observe:

> "When a treaty is open to two interpretations one of which does and the other does not *enable the treaty to have appropriate effects*,

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[1] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950*, p. 221, at p. 229.

[2] *United Nations Conference on the Law of Treaties, op. cit.*, p. 39; emphasis added.

e) A l'audience du Tribunal, le Sénégal a expliqué ainsi sa position :

> « On constate qu'une ligne divisoire — une seule et pas une autre — revient, non pas une fois, par hasard, mais constamment, sans aucune exception, dans la pratique de ces Etats et dans l'exercice de leurs compétences respectives. Et quelle est, Monsieur le Président, cette ligne séparative ? C'est invariablement l'azimut des 240° du cap Roxo. » (Mémoire de la Guinée-Bissau déposé en la présente instance, annexes, livre IV, deuxième partie, plaidoiries du Sénégal devant le Tribunal arbitral, procès-verbal n° 9, p. 83.)

Ces extraits ne laissent subsister aucun doute : le Sénégal considérait que la question faisant l'objet de l'arbitrage était celle de la *totalité* de la frontière maritime, et pas moins. Il affirmait que l'accord de 1960 visait la *totalité* de la frontière maritime, et pas moins. L'objet de l'arbitrage était la détermination de la *totalité* de la frontière maritime, et pas moins. Ainsi, la première question, lue dans son contexte ainsi qu'à la lumière de l'objet et du but du compromis, avait trait au caractère obligatoire de l'accord de 1960 en ce qui concerne la *totalité* de la frontière maritime, et pas moins.

Tout comme le Sénégal prônait l'acceptation de la délimitation de 1960 en ce qui concerne *toute* la frontière maritime, la Guinée-Bissau affirmait que cet accord était sans effet en ce qui concerne la *totalité* de cette frontière.

Le principe d'interprétation exprimé par la maxime *ut res magis valeat quam pereat*, souvent désigné sous le nom de principe de l'effet utile, est un autre principe général d'interprétation qui peut être invoqué sous le chapitre de l'intention des parties. Il traduit une sagesse particulièrement bienvenue dans l'interprétation des accords, tel l'accord en litige, pour lesquels un attachement excessif au sens littéral des mots peut non seulement étouffer l'esprit de l'accord mais également nuire à l'harmonie que l'accord est censé promouvoir. Même si la jurisprudence de la Cour justifie largement d'appliquer le principe de l'effet utile, l'on ne saurait bien sûr pousser l'application de ce principe jusqu'à attribuer aux dispositions du traité un sens qui contredirait leur lettre et leur esprit[1].

D'autre part, il y a lieu de noter que la Commission du droit international a été d'avis que, dans la mesure où la maxime est l'expression d'une règle générale d'interprétation, elle est incorporée dans le paragraphe 1 de l'article 31 qui stipule qu'« un traité doit être interprété *de bonne foi* » et *« à la lumière de son objet et de son but »*[2]. La Commission du droit international poursuit en observant :

> « Lorsqu'un traité est susceptible de deux interprétations, dont l'une permet et l'autre ne permet pas qu'il *produise les effets voulus*, la

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[1] *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, C.I.J. Recueil 1950*, p. 229.

[2] *Conférence des Nations Unies sur le droit des traités, op. cit.*, p. 42 ; les italiques sont de moi.

good faith and the *objects and purposes of the treaty demand* that the former interpretation should be adopted." [1]

An analysis according to the "intentions" approach thus shows that a partial resolution of the dispute was clearly beyond the contemplation of both Parties. Indeed, it was so far from their intentions that one could reasonably postulate that neither Party would have gone to arbitration had it visualized such an inconclusive outcome, for it would only have compounded their problems and left them further from resolution than when they began.

One must, of course, in applying the "intentions" approach, always be on one's guard lest one use it to read into a treaty a stipulation which is not contained in the text. As the Permanent Court of International Justice warned in the *Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels* case (*P.C.I.J., Series A/B, No. 43*, p. 144), the Court was not prepared to hold that the text of a treaty "can be enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the authors of the Treaty, but for which no provision is made in the text itself". The present case involves no such introduction into the document of that which was not already there. The entire document was instinct with this meaning from its very Preamble.

The determination of *the dispute* was thus the basis on which the Tribunal was entrusted with its heavy responsibilities. It was called upon to render certain a boundary obscured by the opposing contentions of Parties and to provide a firm basis on which they could henceforth order their affairs. They could not read their mandate any differently in the light of the norms of international law as set out in the Vienna Convention in particular.

C. *The "Teleological" Approach*

I do not here use the teleological approach, as it is sometimes used in its more extreme forms, for setting an external object or purpose for a treaty which may not coincide with the intentions of the parties. The object or purpose I seek is firmly anchored in the text of the treaty and the parties' own views thereof. To that extent, it is linked to the approaches under the other two heads.

The only extent to which I have invoked a purpose going beyond this is when I refer to accepted principles regarding the underlying purpose of arbitration agreements. Used in this limited manner, there is legitimate scope for the teleological method. As Fitzmaurice observes, "there is no doubt that an element of teleology does enter into interpretation and finds, within limits, a legitimate place there" [2].

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[1] *United Nations Conference on the Law of Treaties, op. cit.*, p. 39; emphasis added.

[2] *Op. cit.*, p. 342.

> bonne foi et *la nécessité de réaliser le but et l'objet du traité exigent* que la première de ces deux interprétations soit adoptée. »[1]

Si l'on s'attache à rechercher l'« intention » des Parties, il apparaît qu'aucune des Parties n'envisageait un règlement partiel du différend. En fait, cette solution était tellement éloignée de leur intention que l'on peut raisonnablement supposer qu'aucune des deux Parties n'aurait recouru à un arbitrage si elle avait prévu une issue aussi peu décisive, celle-ci ne pouvant qu'aggraver le problème et les éloigner encore plus d'un règlement définitif.

En appliquant la méthode fondée sur l'« intention des parties », il y a lieu naturellement d'être toujours sur ses gardes afin de ne pas prêter au traité une disposition qui ne figure pas dans le texte. Dans l'affaire de l'*Accès et stationnement des navires de guerre polonais dans le port de Dantzig* (*C.P.J.I. série A/B n^o 43*, p. 144), la Cour permanente de Justice internationale a averti que la Cour n'était pas disposée à admettre que l'on puisse élargir le texte d'un traité « et y voir des stipulations représentées comme étant le résultat des intentions proclamées par les auteurs du traité, mais que ne formule aucune disposition du texte lui-même ». En ce qui concerne l'affaire dont nous sommes saisis, il n'est pas question d'introduire dans le document des stipulations qui ne s'y trouvent pas déjà. Le sens se dégage de l'ensemble du document dès le préambule.

Le règlement *du différend* était donc la base sur laquelle le Tribunal a été chargé de ses lourdes responsabilités. On attendait de celui-ci qu'il définisse avec netteté une frontière indistincte du fait des prétentions contradictoires des Parties et qu'il établisse une base solide sur laquelle les Parties puissent à l'avenir ordonner leurs affaires. Les arbitres ne pouvaient pas interpréter différemment leur mandat à la lumière des normes du droit international telles qu'elles sont énoncées dans la convention de Vienne en particulier.

C. L'approche « téléologique »

Je n'appliquerai pas ici l'approche téléologique, telle qu'elle est quelquefois appliquée sous ses formes les plus extrêmes pour assigner au traité un objet ou un but extrinsèque qui pourrait ne pas coïncider avec les intentions des parties. Je recherche un objet ou un but qui soit solidement ancré dans le texte du traité et dans la position adoptée par les parties elles-mêmes à ce sujet. A cet égard, cette approche est liée aux approches présentées dans les deux sections précédentes.

Je ne vais plus loin en invoquant un but plus étendu que lorsque je fais appel aux principes établis concernant le but fondamental des compromis d'arbitrage. Dans cette limite, il est légitime de recourir à la méthode téléologique. Comme le fait observer Fitzmaurice, « il est indubitable qu'un élément téléologique entre dans l'interprétation et y occupe, dans certaines limites, une place légitime »[2].

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[1] *Conférence des Nations Unies sur le droit des traités, op. cit.*, p. 42; les italiques sont de moi.
[2] *Op. cit.*, p. 342.

Used in this fashion, it provides through another approach a confirmation of the conclusions reached through the other two approaches.

With those prefatory remarks, and subject to the limitations indicated, I may observe that the underlying purpose of an arbitration agreement is clearly the amicable settlement of the issues which the parties have committed for resolution to the arbitral tribunal. As Verzijl observes, arbitration is "a procedure of international law destined to terminate a dispute which has arisen between sovereign States by the decision, vested with binding force, of one or more third persons" [1]. This purpose derives added strength from the fact that it accords with one of the high objectives of international law — the harmonious resolution of international disputes so as to eliminate continuing frictions that endanger peace.

The Permanent Court of International Justice had occasion to use the teleological method, in the context of arbitration, and to pronounce upon the end which arbitration treaties should serve. In the *Factory at Chorzów, Jurisdiction* case, in discussing Article 23 of the German-Polish Convention concluded at Geneva in 1922 (which it described as "a typical arbitration clause"), it observed:

> "For the interpretation of Article 23, account must be taken not only of the historical development of arbitration treaties, as well as of the terminology of such treaties, and of the grammatical and logical meaning of the words used, but also and more especially of the function which, in the intention of the contracting Parties, is to be attributed to this provision." (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 24.)

The Court went on to add:

> "An interpretation which would confine the Court simply to recording that the Convention had been incorrectly applied or that it had not been applied, without being able to lay down the conditions for the re-establishment of the treaty rights affected, would be contrary to what would, *prima facie*, be the natural object of the clause; for a jurisdiction of this kind, instead of settling a dispute once and for all, would leave open the possibility of further disputes." (*Ibid.*, p. 25.)

These considerations have strong relevance to the case before us having regard to the Tribunal's restrictive interpretation of the clause spelling out its function — an interpretation which, to borrow the Court's phraseology, "instead of settling a dispute once and for all, would leave open the possibility of further disputes".

In the context of the present case these considerations lead to the view that the Arbitral Tribunal was under the *compromis* charged with a duty to

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[1] J. H. W. Verzijl, *International Law in Historical Perspective*, 1976, Vol. VIII, p. 143.

Ainsi appliquée, l'approche téléologique est un autre moyen encore de confirmer les conclusions auxquelles ont abouti les deux autres approches.

Avec ces remarques introductives, et sous réserve des limites indiquées, je ferai observer que le but fondamental d'un compromis d'arbitrage est manifestement le règlement amiable des questions que les parties ont chargé le tribunal arbitral de résoudre. Comme le note Verzijl, l'arbitrage est « une procédure du droit international visant à mettre fin à un différend né entre des Etats souverains par la décision, ayant force obligatoire, d'une ou plusieurs tierces personnes »[1]. Ce but a d'autant plus de force qu'il concorde avec l'un des objectifs suprêmes du droit international, à savoir le règlement harmonieux des différends internationaux en vue de l'élimination des frictions continues qui mettent la paix en danger.

La Cour permanente de Justice internationale a eu l'occasion d'appliquer la méthode téléologique, à propos de l'arbitrage, et de se prononcer sur ce que doit être le but d'une convention d'arbitrage. Dans l'affaire de l'*Usine de Chorzów*, examinant l'article 23 de la convention conclue entre l'Allemagne et la Pologne en 1922 (qu'elle qualifie de « clause compromissoire typique »), la Cour permanente a déclaré :

> « Pour l'interprétation de l'article 23, il convient de s'attacher, non seulement à l'évolution historique des conventions d'arbitrage et à leur terminologie, ainsi qu'au sens grammatical et logique des mots employés, mais aussi et surtout à la fonction qui doit, selon la volonté des Parties contractantes, être attribuée à cette disposition. » (*Usine de Chorzów, compétence, arrêt n° 8, 1927, C.P.J.I. série A n° 9*, p. 24.)

La Cour a poursuivi en ajoutant :

> « Une interprétation qui obligerait la Cour à s'arrêter à la simple constatation que la convention a été inexactement appliquée ou qu'elle est restée sans application, sans pouvoir fixer les conditions dans lesquelles les droits conventionnels lésés peuvent être rétablis, irait à l'encontre du but plausible et naturel de la disposition, car une pareille juridiction, au lieu de vider définitivement un différend, laisserait la porte ouverte à de nouveaux litiges. » (*Ibid.*, p. 25.)

Ces considérations revêtent une grande importance pour l'affaire dont nous sommes saisis, vu l'interprétation restrictive que le Tribunal a donnée de la clause qui définit son mandat, interprétation qui, pour emprunter la formule de la Cour permanente, « au lieu de vider définitivement un différend, laisserait la porte ouverte à de nouveaux litiges ».

Dans le cadre de la présente affaire, ces considérations me conduisent à penser que le Tribunal arbitral, en vertu du compromis, avait reçu pour

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[1] J. H. W. Verzijl, *International Law in Historical Perspective*, 1976, vol. VIII, p. 143.

settle the problem which had brought the Parties before it, or, in Verzijl's language, "to terminate a dispute which has arisen between sovereign States". That it has signally failed to do, and any interpretation which renders possible the course the Tribunal took, would not be in consonance with the principle of interpretation under discussion.

In the event of two equally acceptable interpretations, one leaving disputed issues still unsettled and one resolving all issues, the teleological approach would weight the balance in favour of the latter. In the present case, the "textual" approach and the "intentions" approach have already led to the latter interpretation and the teleological approach only confirms it.

When, as in the present case, the parties have broken through years of disagreement to reach the stage of referring their dispute to arbitration, the protection of the *compromis* in all its integrity becomes specially important. The Court needs to be vigilant to safeguard the *compromis* and the arbitration against interpretations which defeat their central purpose.

The limited extent to which I have used the teleological method of interpretation obviates any necessity to analyse it further in the present opinion. Looking forward to the future it may be that the teleological method of interpretation, in contrast to strict juristic formalism, may play a greater role in the development of international law [1]. Interpretation by reference to the "spirit" of the treaty [2] or by reference to important values may well receive more recognition as international law develops [3]. These are questions which the jurisprudence of the future will need to address.

For present purposes it will suffice to observe that the insights to be gained from the teleological method could guard the interpreter from so close an adherence to literal meanings as to cause the fundamental objectives of the document to recede from view.

Interest reipublicae ut sit finis litium applies equally to judicial and arbitral awards, and applies equally to domestic and international litigation. A partial answer that may well result in greater confusion and uncertainty

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[1] See the dissenting opinion of Judge Tanaka in *South West Africa, Second Phase, I.C.J. Reports 1966*, esp. at pp. 276-278.

[2] See the dissenting opinion of Judge Alvarez in *Anglo-Iranian Oil Co., I.C.J. Reports 1952*, p. 126; *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 336; cf. Lord Diplock's observation in *R* v. *Henn* (1980) 2 All ER 166 that in interpreting treaties the Court of Justice of the European Communities seeks to give effect to the "spirit" rather than to the letter of treaties.

[3] See Rousseau, *Droit international public*, I, p. 29; M. S. McDougal, H. D. Lasswell and J. L. Miller, *The Interpretation of Agreements and World Public Order*, 1967, pp. 39-45; Richard Falk, *The Status of Law in International Society*, 1970, pp. 368-377; *id.*, "On Treaty Interpretation and the New Haven Approach: Achievements and Prospects", (1967-1968) 8 *Virginia Journal of International Law*, p. 323; Julius Stone, "Fictional Elements in Treaty Interpretation — A Study in the International Judicial Process", (1953-1955) *Sydney Law Review*, pp. 363-368.

mission de régler le problème qui avait conduit les Parties devant lui, ou, pour employer les mots de Verzijl, « pour mettre fin à un différend qui est né entre Etats souverains ». C'est ce qu'il n'a absolument pas fait et toute interprétation qui rendrait possible la voie que le Tribunal a prise ne serait pas en harmonie avec le principe d'interprétation à l'examen.

Dans le cas où deux interprétations sont également acceptables, l'une laissant des points en litige sans solution, l'autre les réglant tous, l'approche téléologique devrait faire peser la balance en faveur de la seconde. En l'espèce, l'approche « textuelle » et celle de la recherche des « intentions » ont déjà conduit à cette seconde interprétation et l'approche téléologique ne fait que la confirmer.

Lorsque, comme dans la présente affaire, les parties ont mis un terme à des années de désaccord pour en venir au stade où elles soumettent leur différend à l'arbitrage, la protection du compromis dans son intégralité revêt une importance toute particulière. La Cour se doit d'être vigilante pour mettre le compromis et l'arbitrage à l'abri d'interprétations risquant d'aller à l'encontre de leur but essentiel.

La mesure limitée dans laquelle j'ai usé de la méthode téléologique d'interprétation écarte toute nécessité de l'analyser plus avant dans la présente opinion. Si l'on se tourne vers l'avenir, il se peut que la méthode d'interprétation téléologique puisse, en se substituant au strict formalisme juridique, jouer un rôle accru dans le développement du droit international[1]. Il se peut fort bien que la règle qui veut que l'on se réfère, pour l'interprétation, à l'« esprit » du traité[2] ou à des valeurs importantes devienne plus généralement admise à mesure que le droit international se développera[3]. Ce sont là des questions que la jurisprudence devra examiner demain.

Dans la présente affaire, il suffira de relever que les horizons qu'ouvre la méthode téléologique peuvent éviter à l'interprète le risque de trop s'attacher au sens littéral des mots et de perdre ainsi de vue les objectifs fondamentaux de l'instrument en question.

L'adage *interest reipublicae ut sit finis litium* s'applique également aux décisions judiciaires et aux sentences arbitrales, aux procédures nationales et aux procédures internationales. Une réponse partielle qui risque

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[1] Voir l'opinion dissidente de M. Tanaka dans les affaires du *Sud-Ouest africain, deuxième phase, C.I.J. Recueil 1966*, en particulier p. 276-278.

[2] Voir l'opinion dissidente de M. Alvarez dans *Anglo-Iranian Oil Co., C.I.J. Recueil 1952*, p. 126; *Sud-Ouest africain, exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 336; voir la remarque de lord Diplock dans *R* v. *Henn* (1980), 2 *All England Reports*, 166, selon laquelle, lorsqu'elle interprète les traités, la Cour de justice des Communautés européennes cherche à donner effet à l'« esprit » plutôt qu'à la lettre des traités.

[3] Voir Rousseau, *Droit international public*, I, p. 29; M. S. McDougal, H. D. Lasswell et J. L. Miller, *The Interpretation of Agreements and World Public Order*, 1967, p. 39-45; Richard Falk, *The Status of Law in International Society*, 1970, p. 368-377; *id.*, « On Treaty Interpretation and the New Haven Approach: Achievements and Prospects », *Virginia Journal of International Law*, 1967-1968, vol. 8, p. 323; Julius Stone, « Fictional Elements in Treaty Interpretation — A Study in the International Judicial Process », *Sydney Law Review*, 1953-1955, p. 363-368.

than prevailed before is not in keeping with this maxim which supplies the principal rationale for the finality of awards.

Article 34 of the Model Rules on Arbitral Procedure adopted by the International Law Commission declares that the arbitral award "shall settle the dispute definitively and without appeal". It can only do so if it settles the dispute substantially. If it settles part of the dispute, leaving a gaping void yet to be filled by further arbitral determination, one finds it difficult to see how the quality of definitiveness can attach to such an award.

Another facet of the same principle, expressed from the standpoint of the individual litigants rather than the community — *nemo debet bis vexari pro una et eadem causa* (its counterpart in criminal law being *nemo debet bis vexari pro uno et eodem delicto*) — also has relevance here, for, after all the trouble and years of delay involved in getting this arbitration off the ground, both Parties were entitled to expect a final resolution of the dispute between them rather than to have to face a second prolonged arbitral process. The fact that an important segment of the dispute was left undecided had an effect precisely the opposite of that contemplated by these maxims.

If I am correct in the principles of interpretation I have applied, it seems to me that there is only one conclusion the Tribunal could have arrived at in regard to Question 2 had it applied the rules of treaty interpretation recognized alike by customary international law and in its codification in the Vienna Convention on Treaties. These rules were binding on the Tribunal and left it with no alternative. Unless it strayed far from the real dispute by giving a literal meaning to phrases such as "negative answer" picked out of their context in violation of those rules of interpretation, it had necessarily to reach the result that it was its duty to enter into Question 2.

It will be noticed that, in this analysis, I have used well-accepted theories of interpretation which may be said to represent the mainstream view as opposed to other theories of interpretation which still do not command general acceptance. I have refrained from using other theories, as a finding which needs to be so definite as to provide a basis for a declaration of nullity requires to be approached along well-trodden ground.

The preceding analysis has made it clear that the one interpretation pointed to by the contextual, "intentions" and teleological methods is that the entire dispute was the subject of the arbitration in general and of Question 1 in particular. It is also clear that the duty of the arbitrators was to have had constantly before them the main object and purpose of the enterprise on which they were engaged — the determination of the entire maritime boundary and the resolution of the acute dispute that had arisen between the Parties.

The conclusions thus arrived at through the use of principles of inter-

fort d'aggraver la confusion et l'incertitude existantes n'est pas conforme à cet adage, qui reflète la principale raison d'être du caractère définitif des sentences.

L'article 34 du modèle de règles sur la procédure arbitrale adopté par la Commission du droit international dispose que la sentence arbitrale « décide définitivement et sans appel la solution du différend ». Elle ne peut le faire que si elle règle l'essentiel du différend. Si elle n'en tranche qu'une partie, laissant subsister un vide béant que devra combler une nouvelle décision arbitrale, on voit mal comment une telle sentence peut avoir un caractère définitif.

Un autre aspect du même principe, exprimé du point de vue des plaideurs plutôt que de la communauté — *nemo debet bis vexari pro una et eadem causa* (dont le pendant en droit pénal est *nemo debet bis vexari pro uno et eodem delicto*) — est également pertinent en l'espèce car, après tous les efforts qu'elles ont déployés pendant des années pour arriver à cet arbitrage, les deux Parties avaient le droit d'escompter un règlement définitif de leur différend sans avoir à faire face à une deuxième et longue procédure arbitrale. Le fait qu'une part importante du différend n'a pas été tranchée a eu un effet qui est exactement à l'opposé de celui qu'envisagent les adages ci-dessus.

Si je ne me trompe pas dans les principes d'interprétation que j'ai appliqués, il me semble qu'il n'y a qu'une seule conclusion à laquelle le Tribunal aurait pu parvenir concernant la seconde question s'il avait appliqué les règles d'interprétation des traités reconnues à la fois par le droit international coutumier et par sa codification dans la convention de Vienne sur le droit des traités. Ces règles s'imposaient au Tribunal et ne lui laissaient aucune autre possibilité. A moins de beaucoup s'écarter du véritable différend en donnant un sens littéral à des formules telles que « réponse négative » extraites de leur contexte au mépris de ces règles d'interprétation, le Tribunal devait nécessairement parvenir à la conclusion qu'il était tenu d'aborder la seconde question.

On remarquera que, dans cette analyse, j'ai eu recours à des théories d'interprétation très généralement admises, dont on peut dire qu'elles représentent la doctrine principale, à l'inverse d'autres théories d'interprétation qui n'ont pas encore été universellement acceptées. Je me suis abstenu de recourir à d'autres théories car une conclusion qui doit être assez sûre pour permettre de fonder une déclaration de nullité exige qu'on l'examine en se basant sur un terrain solide.

L'analyse qui précède a montré clairement que la seule interprétation à laquelle aboutissent les méthodes de recours au contexte et aux « intentions » et la méthode téléologique est que l'ensemble du différend constituait l'objet de l'arbitrage en général et de la première question en particulier. Il est clair aussi que le devoir des arbitres était d'avoir constamment à l'esprit l'objet et le but essentiels de la tâche qu'ils avaient entreprise, à savoir la détermination de l'ensemble de la frontière maritime et la résolution du grave différend qui avait surgi entre les Parties.

Les conclusions auxquelles on parvient en appliquant les principes

pretation are in fact fortified even further by the Tribunal's own view of the question before it.

The Tribunal was well aware that "the relations" were not confined to the territorial sea, the contiguous zone and the continental shelf, but extended also to the exclusive economic zone and the fishery zone. The ambit of the dispute as extending to all five zones was never in dispute before the Tribunal. The Order of the Tribunal also shows that it was well aware that the boundaries of all five zones were before it for determination. Indeed, the Order is headed, in phraseology no doubt worked out by the Tribunal itself, with the caption "Arbitration Tribunal for the Determination of *the* Maritime Boundary" (emphasis added).

The Tribunal, having decided that the Agreement was — "valid, wholly valid" (Award, para. 82) had to move on to the interpretation of that agreement in the context of the practical dispute that had surfaced between the Parties and was dominating their concern. It was no question of academic interpretation to which the Tribunal was asked to address itself but one firmly embedded in the real world of practical affairs. How did the Tribunal view that task?

To quote its words:

> "The *sole object* of the dispute submitted by the Parties to the Tribunal accordingly relates to the determination of *the* maritime boundary between the Republic of Senegal and the Republic of Guinea-Bissau, a question which they have not been able to settle by means of negotiation." (*Ibid*., para. 27; emphasis added.)

If there were still any doubt regarding the Tribunal's understanding of the question which it was addressing, such doubt is dispelled by the Tribunal itself. It says in paragraph 83 of its Award:

> "The Tribunal is not attempting to determine at this point whether there exists a delimitation of the exclusive economic zones based on a legal norm other than the 1960 Agreement, such as a tacit agreement, a bilateral custom or a general norm. *It is merely seeking to determine whether the Agreement in itself can be interpreted so as to cover the delimitation of the whole body of maritime areas existing at present.*" (Emphasis added.)

If that was the question the Tribunal was seeking to address, the answer it gave was clearly in the negative.

That the dispute related to the entire boundary was thus incontrovertible. That fact, firmly set in concrete, so to speak, provided the mould within which the arbitration was conceived and the *compromis* took its eventual shape — a mould which no interpretation of the *compromis* was free to break through. That was the setting in which Questions 1 and 2 require to be read and if, as we are obliged by Article 31 of the Vienna Convention on Treaties to do, we take into account the object and purpose of the Agreement, that is the conclusion to which we are inexorably led.

d'interprétation se trouvent d'ailleurs renforcées par la conception que le Tribunal lui-même avait de la question qui lui était soumise.

Le Tribunal savait bien que « les relations » ne se limitaient pas à la mer territoriale, à la zone contiguë et au plateau continental, mais s'étendaient aussi à la zone économique exclusive et à la zone de pêche. Il n'a jamais été contesté devant le Tribunal que la portée du différend s'étendît aux cinq zones. La décision qu'il a rendue montre aussi qu'il était conscient du fait que les limites de ces cinq zones lui étaient soumises pour qu'il statue à leur sujet. D'ailleurs, la sentence porte comme en-tête, selon des termes que le Tribunal a certainement choisis lui-même, le titre « Tribunal arbitral pour la détermination de *la* frontière maritime » (les italiques sont de moi).

Ayant décidé que l'accord était « valable, entièrement valable » (sentence, par. 82), il incombait au Tribunal de passer à l'interprétation de cet accord dans le contexte du différend concret qui s'était élevé entre les Parties et qui était au premier rang de leurs préoccupations. La question à laquelle il était ainsi demandé au Tribunal de répondre n'était pas une question d'interprétation académique, mais une question très concrète et fermement enracinée dans le réel. Comment le Tribunal envisageait-il cette tâche?

Pour citer les termes que le Tribunal a employés:

> « Le *seul objet* du différend soumis par les Parties au Tribunal porte donc sur la détermination de la frontière maritime entre la République du Sénégal et la République de Guinée-Bissau, question qu'elles n'ont pu résoudre par voie de négociation. » (*Ibid.*, par. 27; les italiques sont de moi.)

S'il devait encore subsister le moindre doute concernant la façon dont le Tribunal avait compris la question qu'il examinait, ce doute est dissipé par le Tribunal lui-même. Au paragraphe 83 de sa sentence, il déclare:

> « Le Tribunal ne recherche pas ici s'il existe une délimitation des zones économiques exclusives fondée sur une norme juridique autre que l'accord de 1960, telle qu'un accord tacite, une coutume bilatérale ou une norme générale. *Il cherche seulement à voir si l'accord, en lui-même, peut être interprété de manière à englober la délimitation de l'ensemble des espaces maritimes actuellement existants.* » (Les italiques sont de moi.)

Si telle était la question que le Tribunal cherchait à régler, il y a clairement répondu par la négative.

Le fait que le différend avait trait à la frontière dans son ensemble était donc incontestable. Ce fait, solidement gravé dans la pierre, pour ainsi dire, fournissait le moule dans lequel était conçu l'arbitrage, qui a donné au compromis la forme qu'il a revêtue et dont aucune interprétation du compromis n'aurait dû pouvoir sortir. Tel était le contexte dans lequel la première et la seconde question devaient être lues; et si, comme l'article 31 de la convention de Vienne sur le droit des traités nous en fait obligation, nous tenons compte de l'objet et du but de l'accord, telle est la conclusion à laquelle nous sommes inexorablement conduits.

It was of course open to the Tribunal to reject the contentions of both Parties in regard to the scope of applicability of the 1960 Agreement and to answer as it did that it applied only to some sectors of the boundary. However, consistently with the object and purpose of the Arbitration Agreement, it could then only read Question 2 as throwing on it the burden of determining that which Question 1 had left undetermined and to complete the task entrusted to it. To settle part of the boundary dispute and leave other matters in a state of suspense, awaiting later determination, was to abdicate its function and defeat its purpose.

The Tribunal has thus failed to interpret the Agreement consistently with its own understanding of the question before it. It has also failed to give effect to its mandatory duty under the Vienna Convention and to accepted rules of interpretation. It has thereby left an important portion of its commitment dangling unresolved. It has increased the problems of the Parties rather than discharged its duty of resolving them. In short, it has lost sight of the *raison d'être* leading to its creation. Such a patent nullifying factor entitles this Court, for reasons set out later in this opinion, to declare that the Award was undermined at its foundations and therefore cannot stand. Having regard to the widespread and increasing reliance on international arbitration as a means for peaceful resolution of disputes, it would have a damaging influence upon this commendable trend if arbitral bodies solemnly charged with the settlement of major issues of this nature should be able, by such restrictive interpretations of their jurisdiction, to avoid the onus and responsibility of deciding the issues committed to their care.

What follows in law from the principles outlined in the preceding discussion?

II. IS THE AWARD A NULLITY?

A consideration of the legal effect on the Award of the circumstances outlined thus far necessitates the examination of a number of legal principles, all of which were the subject of detailed submissions to this Court. The central question to be addressed is whether the manifestly incorrect interpretation of the *compromis* and of the Tribunal's mandate, followed by the Tribunal's consequent course of action, results in the nullity of the Award. If this result follows in law, the further question must be examined whether the Award is a nullity in its entirety or only in regard to the decision not to examine the issues remaining for examination under Question 2.

The ensuing enquiry deals first with the legal presumptions and principles applicable to the protection of the Award. The concepts of nullity and *excès de pouvoir* will then be briefly examined, followed by an examination of the question whether the nullity of an international arbitral award takes effect of its own force or depends on the existence of a Tribunal competent so to declare. Two conceptual questions will then be consid-

Il était bien sûr loisible au Tribunal de rejeter les arguments des deux Parties en ce qui concerne la portée de l'accord de 1960 et de répondre, comme il l'a fait, que cet accord ne s'appliquait qu'à certains secteurs de la frontière. Toutefois, compte tenu de l'objet et du but du compromis d'arbitrage, le Tribunal ne pouvait ensuite lire la seconde question que comme lui imposant de déterminer ce que la première question avait laissé indéterminé et d'achever la tâche qui lui avait été confiée. Régler une partie du différend frontalier en laissant d'autres questions en suspens, dans l'attente d'une détermination ultérieure, était, pour le Tribunal, se dérober à sa fonction et aller à l'encontre de sa raison d'être.

Le Tribunal n'a donc pas interprété le compromis conformément à son propre entendement de la question qui lui était soumise. Il n'a pas non plus donné effet au devoir impératif que lui imposaient la convention de Vienne et les règles d'interprétation reconnues. Ce faisant, il a laissé pendante et sans solution une partie importante de sa tâche. Il a aggravé la difficulté des Parties, au lieu de remplir sa mission, qui était de les résoudre. En bref, il a perdu de vue la raison pour laquelle il avait été créé. Une cause de nullité aussi patente autorise la Cour, pour les raisons exposées plus loin dans la présente opinion, à dire que la sentence était minée dans ses fondements et ne peut donc être maintenue. Eu égard au recours très large et croissant qui s'attache à l'arbitrage international comme moyen de règlement pacifique des différends, cette louable tendance risquerait d'être compromise si des organes arbitraux solennellement chargés de régler des questions majeures de cette nature pouvaient, en interprétant leur compétence de façon aussi restrictive, éluder la charge et la responsabilité de trancher les questions confiées entre leurs mains.

Quelles sont les conséquences qui découlent en droit des principes esquissés dans l'examen qui précède?

II. LA SENTENCE EST-ELLE NULLE?

Pour analyser l'effet juridique sur la sentence des circonstances décrites jusqu'ici, il faut examiner un certain nombre de principes juridiques qui ont tous fait l'objet de conclusions détaillées devant la Cour. La question centrale est de savoir si l'interprétation manifestement incorrecte du compromis et de la mission confiée au Tribunal, ainsi que la conduite ultérieure du Tribunal, entraîne la nullité de la sentence. Si telle est la conséquence en droit, il faut alors se demander si la sentence est nulle en sa totalité ou seulement en ce qui concerne la décision de ne pas examiner les points restant à trancher dans le cadre de la seconde question.

Dans l'étude qui suit, on traitera d'abord des présomptions et principes juridiques applicables à la protection de la sentence avant d'examiner brièvement les concepts de nullité et d'excès de pouvoir. On verra ensuite si la nullité d'une sentence arbitrale prend effet par elle-même ou si elle dépend de l'existence d'un tribunal ayant compétence pour en juger. Il faut alors considérer deux questions conceptuelles, qui sont celles de

ered — whether the failure to answer Question 2 was the subject of a decision and whether a negative decision cannot constitute an *excès de pouvoir*, as submitted by Senegal. A brief examination follows of Guinea-Bissau's contention that the decision is nullified in consequence of absence of reasons and of Senegal's submission that the principle of *compétence de la compétence* places questions of interpretation within the exclusive domain of the Tribunal. The enquiry concludes with a somewhat more extended discussion of the principle of severability as applied to the issues already decided and those awaiting decision.

Burden of proof of invalidity of Arbitral Award

As Balasko has written in his celebrated work [1], the validity of the arbitral award is to be presumed.

In the *Arbitral Award Made by the King of Spain* (*I.C.J. Reports 1960*, p. 192, at p. 206), this Court acted on the principle that the burden lay upon the party contending that the award is invalid. The ensuing enquiry is undertaken on this basis and with due deference to the presumption of validity. The burden of displacing that presumption lies on Guinea-Bissau and that burden, having regard to the importance of the finality of arbitral awards, is a heavy one. Moreover, the contention of Guinea-Bissau (public sitting of 4 April 1991, CR 91/3, pp. 85-87) that, in the case of a patent flaw, the burden of proof of validity lies upon the parties seeking to uphold it is not entitled to succeed. This opinion proceeds upon the basis that the party impugning the award is at all times under the burden of proving that sufficiently weighty circumstances exist to support its contention that the award is invalid.

Protection of the Award and protection of the compromis

The Republic of Senegal has urged before us, and rightly so, that we should, when invited to pronounce upon the validity of an award, bear in mind that the institution of arbitration represents one of the major achievements of the international legal order. A heavy burden of responsibility thus rests upon an international tribunal which is invited to make a declaration that an arbitral award, entered under a valid *compromis* freely contracted between the parties, is null and void. Such a declaration is not one to be lightly sought or lightly granted by any court.

At the same time it should be observed that a proper respect for international arbitration involves not only respect for the award but also respect for the *compromis* which provides the foundation on which the award stands. While, therefore, one must respect the integrity and finality of the arbitral award, the principle of deference to the award cannot entrench awards regardless of major discrepancies between the conduct of the arbi-

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[1] A. Balasko, *Causes de nullité de la sentence arbitrale en droit international public*, 1938, p. 201.

savoir si le fait de ne pas répondre à la seconde question a résulté d'une décision et si une décision négative ne peut pas constituer un excès de pouvoir, ainsi que le Sénégal l'affirme. On examinera ensuite brièvement la thèse de la Guinée-Bissau, selon laquelle la décision est frappée de nullité en conséquence de l'absence de motivation, et celle du Sénégal, selon laquelle le principe de la compétence de la compétence fait que les questions d'interprétation sont du ressort exclusif du Tribunal. L'on analysera enfin un peu plus en détail le principe de séparabilité tel qu'appliqué aux problèmes déjà réglés et à ceux restant en suspens.

Charge de la preuve de l'invalidité de la sentence arbitrale

Comme Balasko l'a écrit dans son ouvrage célèbre[1], la validité d'une sentence arbitrale doit être présumée.

Dans l'affaire de la *Sentence arbitrale rendue par le roi d'Espagne* (*C.I.J. Recueil 1960*, p. 206), la Cour a suivi le principe selon lequel la charge de la preuve incombe à la partie prétendant que la sentence est invalide. L'étude qui suit part de ce principe et tient dûment compte de la présomption de validité. La charge de renverser cette présomption incombe à la Guinée-Bissau et cette charge, compte tenu de l'importance du caractère définitif des sentences arbitrales, est lourde. De plus, la thèse de la Guinée-Bissau (audience publique du 4 avril 1991, CR 91/3, p. 85-87) selon laquelle, dans le cas d'un vice patent, c'est à la partie qui défend la sentence qu'il incombe de prouver qu'elle est valide ne saurait être accueillie. La présente opinion part de l'idée que la partie qui conteste la sentence doit dans tous les cas prouver l'existence de facteurs de suffisamment de poids à l'appui de son allégation d'invalidité de la sentence.

Protection de la sentence et protection du compromis

La République du Sénégal a soutenu devant la Cour, et ce à juste titre, que lorsque nous sommes appelés à nous prononcer sur la validité d'une sentence nous devons garder à l'esprit que l'institution de l'arbitrage représente l'une des grandes réalisations de l'ordre juridique international. Lourde est donc la responsabilité qui pèse sur une juridiction internationale invitée à déclarer nulle une sentence arbitrale rendue en vertu d'un compromis valide librement conclu par les parties. Une telle déclaration de nullité ne doit pas être demandée à la légère, et aucune juridiction ne doit la prononcer à la légère.

Dans le même temps, il convient de noter que le respect qui est dû à l'arbitrage international exige non seulement le respect de la sentence mais aussi celui du compromis qui est la base sur laquelle la sentence repose. En conséquence, si l'on doit respecter l'intégrité et le caractère définitif de la sentence arbitrale, ce principe de déférence à l'égard des sentences ne saurait les protéger quelle que soit la gravité des écarts entre

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[1] A. Balasko, *Causes de nullité de la sentence arbitrale en droit international public*, 1938, p. 201.

tration and the course charted out for it by the *compromis*. Far from preserving respect for the arbitral institution, such an approach would undermine the proper respect the institution should command. Absolute finality can only be bought at the cost of detriment to arbitration as an institution.

There is a natural tension between the two principles outlined, and the demarcation of the borderline between them is hence a task calling for anxious consideration. In that task we are called upon to weigh the benefits of certainty against the danger of departures from the *compromis* and there is no set formula that will match these considerations against each other. The Court's task is not an easy one. Yet, as with so many instances in the law where opposing principles compete for supremacy, there are cases where the one consideration is present in so strong a measure that the other must clearly recede. This case is one such.

The jurisprudence of international law offers us many examples where the principle of the integrity of the *compromis* has prevailed over that of the integrity of the award. For example, where a tribunal, invited to decide whether one party or the other should be awarded sovereignty over a territory does not decide this question but examines rather whether there should be a servitude over the territory, the award clearly cannot stand (as happened in the *Aves Island* case of 1865 where the Queen of Spain was arbitrator [1]). So, also, where an arbitrator, invited to choose between two boundary lines, recommends a third line, he clearly oversteps the limit of his authority [2]. These are cases clearly travelling beyond the scope of the arbitrator's authority.

As will be discussed later, decisions can take a positive or negative form. One can take a decision to act when the *compromis* clearly requires one not to act, just as one can take a decision not to act where the *compromis* clearly requires one to act. In both cases alike the decision is one beyond the scope of the arbitrator's authority and involves the arbitrator in stepping out, so to speak, from the frame of the *compromis*. When this happens the resulting decision can command no claim to validity, for it is not based on that bedrock of mutual consent which is a prerequisite to arbitral authority. The award, lacking that foundation, cannot sustain itself or command recognition.

The concept of nullity

A brief prefatory note will clarify the terminology adopted in this section, as confusion is sometimes caused in the area of nullity by the some-

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[1] A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux*, Vol. II, p. 404, at p. 414.

[2] See the *Northeastern Boundary: Arbitration under the Convention of September 29, 1827*, where the King of the Netherlands, invited to choose between the boundary lines, recommended, in his award of 1831, a third line (Moore, *International Arbitrations*, Vol. I, pp. 133-136).

la voie suivie par l'arbitrage et le cap que lui traçait le compromis. Loin de préserver le respect de l'institution arbitrale, une telle attitude saperait le respect véritable que cette institution mérite. Imposer de façon absolue le caractère définitif de la sentence ne peut se faire qu'au détriment de l'arbitrage en tant qu'institution.

Il existe une tension naturelle entre les deux principes décrits, et un examen scrupuleux s'impose donc pour les délimiter. Ce faisant, il nous est demandé de peser les avantages de la certitude et le danger des écarts par rapport au compromis, et il n'existe pas de formule toute faite qui permette d'harmoniser ces considérations entre elles. La tâche de la Cour n'est pas une tâche aisée. Pourtant, comme cela arrive si souvent en droit, quand des principes s'opposent et visent à l'emporter les uns sur les autres, il est des cas où une considération se présente avec tant de force que l'autre doit à l'évidence passer au second plan. La présente affaire appartient à cette catégorie.

La jurisprudence internationale fournit de nombreux exemples dans lesquels le principe de l'intégrité du compromis l'a emporté sur celui de l'intégrité de la sentence. Ainsi, lorsqu'un tribunal invité à décider laquelle des deux parties au différend doit se voir accorder la souveraineté sur un territoire ne tranche pas cette question mais examine s'il doit exister une servitude sur le territoire, la sentence ne peut évidemment pas être maintenue (comme cela s'est passé dans l'affaire de l'*Ile Aves* en 1865, la reine d'Espagne étant l'arbitre [1]). C'est ainsi également que, lorsqu'un arbitre chargé de choisir entre deux lignes frontière en recommande une troisième, il outrepasse manifestement les limites de son pouvoir [2]. Ce sont là des affaires où il est clair que les pouvoirs de l'arbitre ont été outrepassés.

Comme on le verra plus loin, une décision peut prendre une forme positive ou négative. On peut décider d'agir lorsque le compromis exige clairement de ne pas le faire tout comme l'on peut prendre la décision de ne pas agir lorsque le compromis exige clairement que l'on agisse. Dans l'un et l'autre cas, on est en présence d'une décision qui outrepasse le pouvoir de l'arbitre et qui conduit ce dernier à sortir, pour ainsi dire, du cadre du compromis. En pareil cas, on ne peut soutenir que la décision qui en résulte est valable car elle ne repose pas sur ce fondement du consentement mutuel qui est la condition préalable au pouvoir arbitral. Sans ce fondement, la sentence ne peut se tenir ni être reconnue.

La notion de nullité

Quelques brèves observations liminaires éclairciront la terminologie adoptée dans cette section car, en matière de nullité, les connotations

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[1] A. de Lapradelle et N. Politis, *Recueil des arbitrages internationaux*, vol. II, p. 414.

[2] Voir l'affaire de la *Northeastern Boundary: Arbitration under the Convention of September 29, 1827*, dans laquelle le roi des Pays-Bas, prié de choisir entre les lignes frontière, a, dans sa sentence de 1831, recommandé une troisième ligne (Moore, *International Arbitrations*, vol. I, p. 133-136).

what different connotations which different legal systems attach to some of the expressions used.

Contract, matrimonial law and, more recently, administrative law are traditionally areas where domestic legal systems have had to make distinctions between the results caused by a variety of vitiating factors. The terminology of international law in regard to nullity has its antecedents in those concepts of domestic law. The common law and the civil law have differing approaches to the categorization of the resulting juristic situations.

The civil law differentiates at least three distinct types of legal status resulting from a vitiating factor while the common law, broadly speaking, contents itself with two. The word "nullity" as used in the one system is not therefore identical with the word as used in the other. The language of international law in this field seems in general to have followed the phraseology of the civil law.

The three principal types of nullity, as referred to in the literature of international law, are

(i) inexistence;
(ii) absolute nullity; and
(iii) nullity resulting from the act of annulment by a competent authority[1].

The term "inexistence" is not a term of the common law. Rather, the common law distinguishes between acts which are:

(i) void; and
(ii) voidable, i.e., those which retain their validity and are productive of legal effects unless and until they are set aside by competent authority, in which case the nullity may operate retrospectively.

Category (iii) in the first group of terms would be classified as voidable in the common law, and when the term "nullity" is used in international law it may well be to describe a situation which is only voidable under the common law.

When the term "nullity" is used in this opinion it will not be used in sense (iii) — i.e., not in the sense of voidability — for this Court is not sitting in appeal or review and is not engaged in the exercise of invalidating an order that would otherwise be valid. It is engaged rather in the task of making a pronouncement in relation to the existing status of the Award made by the Arbitration Tribunal.

A word needs to be said to clarify the distinction between categories (i) and (ii) in the first classification.

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[1] See R. Y. Jennings, "Nullity and Effectiveness in International Law", *Cambridge Essays in International Law: Essays in Honour of Lord McNair*, 1965, pp. 65-67.

quelque peu différentes que les divers systèmes juridiques attachent à certaines des expressions utilisées sont parfois source de confusion.

Le droit des contrats, le droit matrimonial et, plus récemment, le droit administratif sont des domaines où les systèmes juridiques nationaux ont traditionnellement dû faire des distinctions entre les résultats de toute une série de vices. La terminologie du droit international en matière de nullité a son origine dans ces notions de droit interne. Les systèmes de la *common law* et du droit civil diffèrent par leur manière de classer les situations juridiques qui en résultent.

Le système de droit civil distingue au moins trois types de statut juridique résultant d'un vice alors que, généralement parlant, la *common law* se contente de deux. La signification du mot « nullité » n'est donc pas identique dans l'un et l'autre système. En règle générale, la terminologie du droit international semble dans ce domaine s'être alignée sur celle du système de droit civil.

Les trois principaux types de nullité relevés par les publicistes sont :

i) l'inexistence ;
ii) la nullité absolue ; et
iii) la nullité résultant de l'annulation par une autorité compétente [1].

Le terme « inexistence » n'est pas un terme de *common law*. La *common law* distingue entre les actes qui sont :

i) nuls ; et
ii) annulables, c'est-à-dire ceux qui conservent leur validité et produisent des effets juridiques tant qu'ils n'ont pas été annulés, par une autorité compétente, auquel cas la nullité peut produire des effets rétroactifs.

La catégorie iii) du premier groupe entrerait, en *common law*, dans celle des actes annulables et lorsque le terme nullité est utilisé en droit international ce peut très bien être pour décrire le statut d'un acte qui, pour la *common law*, est seulement annulable.

Lorsque le terme « nullité » est utilisé dans la présente opinion, il ne le sera pas au sens iii) — c'est-à-dire au sens d'annulabilité — car la Cour ne siège pas en appel ni en revision et n'a pas pour mission d'invalider un acte qui par ailleurs serait valide. Elle a à se prononcer sur le statut de la sentence rendue par le Tribunal arbitral.

Quelques mots sont nécessaires pour clarifier la distinction entre les catégories i) et ii) dans la première classification.

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[1] Voir R. Y. Jennings, « Nullity and Effectiveness in International Law », *Cambridge Essays in International Law : Essays in Honour of Lord McNair*, 1965, p. 65-67.

The inexistent order is one which is no order at all. A person with no judicial authority who purports to make a judicial order would produce an "order" which could be described as non-existent. In no circumstance can this so-called "order" produce any legal consequences whatsoever. It was never a juristic act at all. If, in this case, there was not in fact a majority in favour of the Tribunal's decision by virtue of the President's vote being vitiated by his declaration, that would have been a case of inexistence, which of course is not the position here.

On the other hand, one may have to deal with an order or juristic act which, though regular on the face of it, is rendered illegal by a factor extraneous to the procedural regularity of its creation. For example, a treaty which offends against a rule of *jus cogens*, though complying fully with all the requirements of procedural regularity in its creation, can still be null and void owing to a factor lying outside those procedural formalities. As Jennings points out:

> "the treaty may fulfil all the requirements for a valid treaty and is void not because it lacks an essential ingredient of a valid treaty but because it offends against the general rule of the *jus cogens* . . . The treaty that offends against a rule of the *jus cogens* is not so because it lacks an essential ingredient but, on the contrary, precisely because it is a treaty." (*Op. cit.*, pp. 66-67.)

In other words an act which is a nullity because it offends some fundamental principle is in a different category from an act which was never a juristic act at all.

Inexistence and absolute nullity are thus distinguishable one from the other although they have this in common that they are nullities from their very inception and do not require the declaration of a competent tribunal or a court to render them devoid of legal consequences.

This case has been presented solely on the basis that the act in question, namely the Award of the Tribunal, is inexistent or a nullity *ab initio* requiring no invalidation from this Court, but only a declaration that such act is and has been a nullity from the commencement. The Applicant itself has stressed that it is not addressing any argument to this Court as though it were sitting in appeal or review. This rules out from our consideration the question of voidability.

Senegal has advanced the argument that, inasmuch as no act of avoidance is involved in making a declaration of nullity, the role of a court making such a declaration is reduced to that of a mere mechanical endorser of a pre-existing state of affairs. This contention of Senegal cannot be upheld. Declarations of nullity have an important juristic significance, and the jurisdiction to make such declarations in appropriate circumstances enhances rather than diminishes the role of the Court as a custodian of international law and its principles. Indeed, through the exercise of this jurisdiction, the Court can play a role in imparting a dynamic nature to this developing department of international jurisprudence and

L'acte inexistant n'est pas un acte du tout. Une personne n'ayant aucun pouvoir judiciaire qui prétendrait rendre une décision judiciaire produirait une « décision » qui pourrait être qualifiée d'inexistante. En aucun cas, cette prétendue « décision » ne peut produire d'effets juridiques. Elle n'a jamais constitué un acte juridique. Si, dans cette affaire, il n'y avait pas en fait eu de majorité pour la décision du Tribunal au motif que le vote du président était vicié par sa déclaration, il y aurait eu inexistence, ce qui bien entendu n'est pas le cas ici.

D'autre part, on peut avoir affaire à une décision ou à un acte juridique qui, bien que régulier en apparence, est illégal pour un motif sans rapport avec la régularité procédurale de sa création. Par exemple, un traité qui va à l'encontre d'une règle du *jus cogens*, bien que créé en pleine conformité avec toutes les prescriptions de régularité procédurale, peut néanmoins être nul pour un motif sans rapport avec ces formalités procédurales. Comme le fait observer Jennings :

> « le traité peut remplir toutes les conditions pour être un traité valide et être nul non parce qu'il lui manque un élément essentiel d'un traité valide mais parce qu'il va à l'encontre de la règle générale du *jus cogens*... Un traité qui va à l'encontre d'une règle du *jus cogens* n'a pas cet effet parce qu'il lui manque un ingrédient essentiel, mais, au contraire, précisément parce qu'il est un traité. » (*Op. cit.*, p. 66-67.)

En d'autres termes, un acte qui est nul parce qu'il va à l'encontre d'un principe fondamental ne relève pas de la même catégorie qu'un acte qui n'a jamais été un acte juridique.

L'inexistence et la nullité absolue peuvent donc être distinguées bien qu'elles aient ceci en commun qu'elles sont des nullités dès le départ et qu'une déclaration d'un tribunal ou d'une juridiction compétente n'est pas nécessaire pour les priver d'effets juridiques.

La présente affaire, telle qu'elle a été soumise à la Cour, repose uniquement sur l'hypothèse que l'acte en question, à savoir la sentence du Tribunal, est inexistant ou nul *ab initio*, et que la Cour n'a pas besoin de l'invalider mais qu'il lui suffit de le déclarer nul depuis l'origine. La requérante elle-même a souligné qu'elle ne s'adresse pas à la Cour en tant qu'instance d'appel ou de revision. Pour cette raison, nous n'avons pas besoin d'examiner la question de l'annulabilité.

Le Sénégal a avancé l'argument selon lequel, étant donné qu'aucun acte d'annulation n'est requis pour une déclaration de nullité, le rôle du tribunal qui fait une telle déclaration se réduit à avaliser de façon purement mécanique un état de fait préexistant. Cette thèse du Sénégal ne peut être retenue. Les déclarations de nullité ont une signification juridique importante et la compétence pour faire de telles déclarations dans les circonstances appropriées accroît plutôt qu'elle ne diminue le rôle de la Cour en sa qualité de gardienne du droit international et de ses principes. En exerçant cette compétence, la Cour peut contribuer à donner un caractère dynamique à cette branche en développement de la jurisprudence inter-

help to mould it in a manner which will protect the integrity and prestige of the arbitral process.

Development of the concept of nullity

International law, though still an infant science, has made remarkable progress since the days of Grotius who, at a very rudimentary stage of its evolution, perceived the need to clothe the international arbitral decision with finality and unquestioned validity[1]. The foundations of international arbitration had then to be solidly laid. Yet the law could not remain static and after early inroads upon the principle of finality, made by such writers as Pufendorf, later writers have built upon those foundations a structure increasingly responsive to the varied situations for which it must cater in a changing world.

In the developing jurisprudence that has ensued there appear the names of a galaxy of writers who analyse in great detail the circumstances in which an award can be considered a nullity[2]. As early as 1873 the Institute of International Law adopted a *Règlement* concerning the procedure of arbitral tribunals. Article 27 of the *Règlement* provided that an arbitral award is null and void in certain cases, one of which is excess of authority.

This is not to say that respected voices were not heard supporting the opposite view. The illustrious de Martens, for example, at the Hague Convention of 1899, argued strongly against the possibility of nullifying or revising an arbitral award[3]. So, also, the Hague Conventions of 1899 and 1907 in their articles relating to arbitration speak of arbitration orders as being final and without appeal and do not specify causes of nullity (see Articles 48 and 54 of 1899 and Articles 73 and 81 of 1907).

Yet the weight of opinion has long swung in favour of the view that the validity of arbitral awards is not absolute. The Report of the International Law Commission, 1958, states in regard to the annulment of the award that:

> "Neither the Special Rapporteur nor the Commission itself has accepted the categorical theory that an arbitral award should be

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[1] Grotius, *De Jure Belli ac Pacis*, Book III, Chap. XX (XLVI), in *The Classics of International Law*, ed. J. B. Scott, Vol. II, p. 823.

[2] Guinea-Bissau in its Memorial in the present proceedings (para. 63, footnote) cites an array of publicists including A. Balasko, F. Bondil, E. Borel, F. Castberg, A. El Ouali, P. Guggenheim, W. G. Hertz, M. A. Pierantoni, G. Salvioli, M. Reisman, J. H. W. Verzijl, J. G. Wetter and J. C. Witenberg. To this list may be added Hall, Oppenheim, Brierly, Hyde, Fauchille, Nys, Heffter, Bluntschli, Fiore, Twiss and Rolin among others.

[3] See *Proceedings of the Hague Peace Conferences: Conference of 1899*, p. 186.

nationale et à la façonner d'une manière qui protégera l'intégrité et le prestige du processus arbitral.

Développement de la notion de nullité

Le droit international, quoique étant encore une science dans l'enfance, a fait des progrès remarquables depuis l'époque de Grotius qui, a un stade très primitif de son évolution, avait perçu la nécessité d'investir la décision arbitrale internationale d'un caractère définitif et d'une validité incontestée[1]. Les fondements de l'arbitrage international devaient alors être solidement posés. Mais le droit ne pouvait demeurer statique et après que des auteurs comme Pufendorf ont ouvert les premières brèches dans le principe du caractère définitif de la sentence, la doctrine plus récente a édifié sur ces bases une structure de plus en plus adaptée à la diversité des situations auxquelles elle doit répondre dans un monde en mutation.

Au fur et à mesure que la théorie du droit se développait, un grand nombre d'auteurs sont apparus qui analysaient de manière très approfondie les circonstances dans lesquelles une sentence pouvait être considérée comme nulle[2]. Dès 1873, l'Institut de droit international a adopté un règlement concernant la procédure des tribunaux arbitraux. L'article 27 de ce règlement disposait qu'une sentence arbitrale est nulle dans certains cas, notamment en cas d'abus d'autorité.

Cela n'est pas à dire que des voix respectées n'aient pas exprimé l'opinion opposée. L'illustre de Martens, par exemple, à la conférence de La Haye de 1899, a vigoureusement combattu la possibilité d'annuler ou de reviser une sentence arbitrale[3]. De même, les conventions de La Haye de 1899 et 1907, dans leurs articles relatifs à l'arbitrage, décrivent les sentences arbitrales comme définitives et sans appel et n'indiquent pas de causes de nullité (voir articles 48 et 54 de la convention de 1899 et articles 73 et 81 de la convention de 1907).

Néanmoins, c'est l'opinion selon laquelle la validité des sentences arbitrales n'est pas absolue qui a depuis longtemps prévalu. Dans son rapport de 1958, la Commission du droit international déclare ce qui suit en ce qui concerne l'annulation d'une sentence:

> « Le rapporteur spécial et la Commission elle-même n'ont pas adhéré à la doctrine absolue selon laquelle la sentence arbitrale

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[1] Grotius, *De jure belli ac pacis*, livre III, chap. XX (XLVI), dans *The Classics of International Law*, publié sous la direction de J. B. Scott, vol. II, p. 823.

[2] Dans son mémoire déposé en la présente instance (par. 63, note de bas de page), la Guinée-Bissau cite toute une série de publicistes et notamment A. Balasko, F. Bondil, E. Borel, F. Castberg, A. El Ouali, P. Guggenheim, W. G. Hertz, M. A. Pierantoni, G. Salvioli, M. Reisman, J. H. W. Verzijl, J. G. Wetter et J. C. Witenberg. A cette liste, on peut ajouter Hall, Oppenheim, Brierly, Hyde, Fauchille, Nys, Heffter, Bluntschli, Fiore, Twiss et Rolin, entre autres.

[3] Voir *Conférence internationale de la paix, 1899, Procès-verbaux des séances de la Conférence*, p. 186.

> treated as final even if found to be morally unacceptable or practically unenforceable." [1]

Further developments and refinements of the bases of nullity must necessarily ensue, and this Court will no doubt be called upon to play an important role in evolving the principles that will enable the balance to be held true, between the principle of finality and the due recognition of vitiating factors.

The nullity of an award given without jurisdiction is moreover a well-accepted proposition in domestic legal systems. In the common law one of the classic texts on the finality of judgments and awards states:

> "it is quite clearly established that, wherever the arbitral tribunal has exceeded the jurisdiction with which it has been invested by the agreement of the parties, or by the order of the court, or by the statute, the award, so far from operating as *res judicata*, is deemed an absolute nullity either in whole, or in part, as the case may be" [2].

In the civil law the principle that an arbitrator cannot exceed the terms of his authority is a time-honoured one going all the way back to the Roman maxim *arbiter nihil extra compromissum facere potest*. The principle that arbitrators cannot exceed their powers and decide points which have not really been submitted to them was adopted by international law at a very early stage [3].

Excès de pouvoir *and* infra petita

The doctrine has been continuously developed since its formulation by early writers such as Vattel *(op. cit.)*, especially under the rubric of *excès de pouvoir*, and numerous cases have built around it a considerable body of jurisprudence. One has only to look at treatises such as that of Dr. Verzijl [4] to see the numerous major cases where the plea of *excès de pouvoir* has been raised over a long historical period. Within the rubric of *excès de pouvoir*, *infra petita* covers the case where a tribunal runs counter to its *compromis* in not addressing issues it was required to address.

Excès de pouvoir is one of the most invoked rubrics of nullity and one of the areas where arbitral law will continue to face challenges and require development. Although the Parties, both of civil law jurisdictions, pre-

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[1] *Yearbook of the International Law Commission*, 1958, Vol. 2, p. 11.

[2] G. Spencer Bower and A. K. Turner, *Res Judicata*, 2nd ed., p. 102.

[3] Vattel, *Le droit des gens*, 1758 (para. 329), in *The Classics of International Law*, ed. J. B. Scott, Carnegie Institution of Washington, 1916, Vol. 3, p. 224, translated by G. Fenwick.

[4] J. H. W. Verzijl, *op. cit.*, p. 577.

devait être considérée comme définitive, même si elle se révélait comme moralement inacceptable ou pratiquement inapplicable. »[1]

De nouveaux développements et affinements des motifs de nullité doivent nécessairement en découler et la Cour sera certainement appelée à jouer un rôle important en développant les principes qui permettront de réaliser un véritable équilibre entre le principe qu'une sentence est définitive et la reconnaissance, quand il y a lieu, de l'existence de vices.

La nullité d'une sentence rendue en l'absence de compétence est de plus un principe bien accepté dans les systèmes juridiques internes. En *common law*, l'un des textes classiques sur le caractère définitif des jugements et des sentences déclare :

> « il est clairement établi que lorsqu'un tribunal arbitral outrepasse la compétence dont il a été investi par la convention des parties, par la décision du tribunal ou par la loi, sa sentence, loin d'avoir l'autorité de la chose jugée, est considérée comme frappée de nullité absolue soit dans sa totalité, soit en partie, selon le cas »[2].

Dans les systèmes de droit civil, le principe selon lequel un arbitre ne peut outrepasser son autorité est consacré depuis longtemps puisqu'il remonte à l'adage romain *arbiter nihil extra compromissum facere potest.* Le principe qui veut que les arbitres ne peuvent outrepasser leurs pouvoirs et trancher des points qui ne leur ont pas été véritablement soumis a été adopté très tôt en droit international[3].

Excès de pouvoir et infra petita

La doctrine s'est continuellement développée depuis sa formulation par les premiers publicistes tels que Vattel *(op. cit)*, en particulier sous la rubrique de l'excès de pouvoir, et de nombreuses affaires ont constitué autour d'elle une jurisprudence considérable. Il suffit de consulter des traités comme celui de Verzijl[4], pour voir qu'au cours de l'histoire les grandes affaires où l'excès de pouvoir a été invoqué ont été nombreuses. Dans la catégorie des excès de pouvoir, on entend par décision *infra petita* le cas où un tribunal est allé à l'encontre du compromis en n'examinant pas les problèmes qu'il était requis de trancher.

L'excès de pouvoir est l'un des motifs de nullité les plus invoqués et l'un des domaines dans lesquels le droit de l'arbitrage continuera d'être confronté à des défis et devra être développé. Bien que les Parties, toutes

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[1] *Annuaire de la Commission du droit international*, 1958, vol. 2, p. 11.

[2] G. Spencer-Bower et A. K. Turner, *Res judicata*, 2ᵉ éd., p. 102.

[3] Vattel, *Le droit des gens*, 1758 (par. 329), dans *The Classics of International Law*, publié sous la direction de J. B. Scott, Carnegie Institution of Washington, 1916, vol. 3, p. 224.

[4] J. H. W. Verzijl, *op. cit*, p. 577.

ferred to couch their arguments in terms of *excès de pouvoir*, similar concepts of total nullity find a place in the jurisprudence of other legal systems, including the common law, where the concept of *ultra vires* has recently received extended development in the context of administrative [1] and arbitral [2] law. In Islamic jurisprudence, likewise, a similar notion of nullity existed under the well-recognized principle of legitimacy. Under this principle, all acts, procedures, dispositions and final decisions of the public authorities at any level were held to be invalid and not legally binding as to the people they affected, save to the extent that they were consistent with the law [3]. The basic notion of the nullity of an act performed without the requisite authority thus enjoys wide recognition in the world's legal systems.

In the present case, the *infra petita* doctrine perhaps encapsulates the relevant principle even more neatly, for the Tribunal has fallen short of performing that which it should have performed and in this way acted as it was not entitled to act.

Is nullity automatic or dependent on the existence of a competent tribunal?

The next stage of enquiry is into the question whether such nullity is restricted to cases where a tribunal with necessary authority exists to make such a pronouncement or whether the nullity is automatic, producing an instant effect irrespective of the existence or absence of a tribunal competent so to declare.

The latter position is not free of difficulty. One logical consequence of recognizing the concept of automatic nullity is that it gives to dissatisfied parties a legal rubric under which they can unilaterally repudiate an inconvenient award. Parties can then become judges in their own cause and the finality that should attend arbitral awards would theoretically be gravely impaired.

The difficulty was analysed by Sir Hersch Lauterpacht, who, in 1928 [4], pointed out that it results from the co-existence of three rules of international law, each of which individually seems to be inherently sound.

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[1] See H. W. R. Wade, *Administrative Law*, 1988, pp. 39-48.

[2] M. J. Mustill and S. C. Boyd, *Commercial Arbitration*, 1989, pp. 554-555. This work states that non-compliance with certain essential requisites constitutes a patent flaw which could invalidate an award. Among these requisites is the following: "The award must be complete in that it contains an adjudication upon all the issues submitted to arbitration" (p. 556).

[3] O. A. al-Saleh, "The Rights of the Individual to Personal Security in Islam", in M. C. Bassiouni, *The Islamic Criminal Justice System*, 1982, p. 85.

[4] "The Legal Remedy in Case of Excess of Jurisdiction", *BYBIL*, 1928, p. 118.

deux des pays de droit civil, aient préféré présenter leurs arguments au titre de l'excès de pouvoir, des notions analogues de nullité totale existent dans la jurisprudence d'autres systèmes juridiques, y compris la *common law*, où la notion d'acte *ultra vires* a récemment été considérablement développée dans le contexte du droit administratif[1] et du droit arbitral[2]. En droit islamique, de même, une notion de nullité analogue existait en vertu du principe, largement reconnu, de légitimité. Selon ce principe, tous actes, procédures, dispositions et décisions définitives des autorités publiques, à quelque niveau que ce soit, étaient tenus pour non valables et juridiquement non obligatoires à l'égard des intéressés s'ils n'étaient pas conformes à la loi[3]. La notion fondamentale selon laquelle un acte accompli sans le pouvoir nécessaire est nul est donc largement reconnue dans les systèmes juridiques du monde entier.

En l'espèce, la doctrine en matière de décisions *infra petita* définit peut-être plus exactement encore le principe en question, car le Tribunal a manqué d'exercer la fonction qu'il aurait dû remplir et a de la sorte agi de la façon dont il n'avait pas le droit d'agir.

La nullité est-elle automatique ou est-elle subordonnée à l'existence d'un tribunal compétent pour la déclarer?

L'étape suivante de l'examen porte sur la question de savoir si cette nullité est limitée aux cas où il existe un tribunal ayant la compétence nécessaire pour la prononcer ou si la nullité est automatique et d'effet instantané, même en l'absence de tribunal compétent pour la déclarer telle.

Ce dernier point de vue ne va pas sans difficultés. Une conséquence logique de l'acceptation de la nullité de plein droit est qu'elle donne aux parties mécontentes un moyen juridique leur permettant de refuser unilatéralement toute validité à une sentence qui ne leur convient pas. Les parties peuvent ainsi devenir juges de leur propre cause, ce qui risque en théorie de porter gravement atteinte au caractère définitif qui doit s'attacher aux sentences arbitrales.

Cette difficulté a été analysée par sir Hersch Lauterpacht qui, en 1928[4], a fait observer qu'elle résulte de la coexistence de trois règles du droit international, dont chacune, prise individuellement, semble être intrinsèquement saine.

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[1] Voir H. W. R. Wade, *Administrative Law*, 1988, p. 39-48.

[2] M. J. Mustill et S. C. Boyd, *Commercial Arbitration*, 1989, p. 554-555. Dans cet ouvrage, les auteurs font valoir que l'inobservation de certaines conditions essentielles constitue un vice flagrant qui peut invalider une sentence. Parmi ces conditions, ils indiquent la suivante: « la sentence doit être complète en ceci qu'elle contient une décision sur l'ensemble des problèmes soumis à l'arbitrage » (p. 556).

[3] O. A. al-Saleh, « The Rights of the Individual to Personal Security in Islam », dans M. C. Bassiouni, *The Islamic Criminal Justice System*, 1982, p. 85.

[4] « The Legal Remedy in Case of Excess of Jurisdiction », *BYBIL*, 1928, p. 118.

Lauterpacht lists these three rules as follows:

(a) The arbitrator is competent to interpret the instrument conferring jurisdiction upon him and that is virtually to determine the scope of his competence.

(b) In so doing, he must not disregard the terms of reference under which the tribunal has been created.

(c) Owing to the deficiencies of judicial organization of the international community and the absence of an appropriate tribunal no sanction is attached to the disregard of the second principle in consequence of which, as a rule, the awards of arbitral tribunals are final and without appeal.

Though each rule taken by itself is apparently sound, in combination they produce conflicts which, as Lauterpacht points out, are a fruitful source of discredit for the whole institution of international arbitration. Lauterpacht observes that the possibility of the defeated party disobeying an adverse award exposes a sound juridical principle

> "to legal inefficacy and to abuse, inasmuch as it affords an opportunity for cloaking with the garb of legality an essentially law-defying disposition" *(op. cit.)*.

However, he goes on to observe that the remedy is easily supplied by the exercise of a simple and strictly judicial function and that the existence of a judicial tribunal with authority to determine whether the arbitrator had exceeded the terms of reference could be a solution. That judicial tribunal he points out is now existent in the shape of the Permanent Court of International Justice "which is pre-eminently qualified to decide legal questions bearing upon the interpretation of treaties".

The weight of juristic authority is against the view that an award must stand as binding in the absence of a tribunal competent to set it aside. Thus Professor J. L. Brierly [1] describes such a view [2] as a "startling thesis" and points out that such an interpretation does not appear to have occurred to most authors writing on the subject of awards since the Hague Conventions. He cites among others Hall, Oppenheim, Fauchille and Nys. Among these authors, Hall says:

> "An arbitral decision may be disregarded in the following cases: viz. when the tribunal has clearly exceeded the powers given to it by the instrument of submission . . ." [3]

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[1] "The Hague Conventions and the Nullity of Arbitral Awards", *BYBIL*, 1928, p. 115.

[2] As expressed by Professor A. de Lapradelle in *Revue de droit international*, 1928, No. 5, pp. 5-64.

[3] W. E. Hall, *International Law*, 8th ed. (by Pearce Higgins), 1924, p. 420.

Il énumère ces trois règles comme suit :

a) L'arbitre est compétent pour interpréter l'instrument qui lui confère compétence, c'est-à-dire, virtuellement, pour déterminer l'étendue de sa compétence.

b) Ce faisant, il ne doit pas méconnaître le compromis par lequel le tribunal a été créé.

c) En raison des déficiences de l'organisation judiciaire de la communauté internationale et de l'absence de tribunal approprié, aucune sanction ne s'attache à la méconnaissance du second principe, en conséquence de quoi, en règle générale, les sentences des tribunaux arbitraux sont définitives et sans appel.

Bien que chacune de ces règles, prises individuellement, soit apparemment saine, leur combinaison produit des conflits qui, comme le fait observer Lauterpacht, portent gravement atteinte au crédit de toute l'institution de l'arbitrage international. Lauterpacht note que la possibilité que la partie ayant succombé n'obéisse pas à une sentence qui lui est contraire expose un principe juridique sain

> « à l'inefficacité juridique et à des abus, dans la mesure où elle permet de présenter sous l'apparence de la légalité une disposition essentiellement contraire au droit » *(op. cit.).*

Il poursuit toutefois en relevant qu'il est facile d'y porter remède par l'exercice d'une fonction simple et strictement judiciaire et que l'existence d'un tribunal judiciaire compétent pour déterminer si l'arbitre a outrepassé son mandat peut être une solution. Ce tribunal judiciaire existe, déclare-t-il, il s'agit de la Cour permanente de Justice internationale « qui est qualifiée au premier chef pour trancher des questions juridiques touchant l'interprétation des traités ».

La majorité des auteurs réfute l'opinion selon laquelle une sentence est obligatoire en l'absence d'un tribunal compétent pour l'annuler. Ainsi, J. L. Brierly [1] décrit cette opinion [2] comme une « thèse stupéfiante » et fait observer qu'une telle interprétation ne semble pas être venue à l'idée de la plupart des auteurs qui ont écrit sur le sujet des sentences depuis l'adoption des conventions de La Haye. Il cite notamment Hall, Oppenheim, Fauchille et Nys. Parmi ceux-ci, Hall déclare :

> « Une décision arbitrale peut être écartée dans les cas suivants : par exemple lorsqu'il est clair que le tribunal a excédé les pouvoirs que lui conférait le compromis... » [3]

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[1] « The Hague Conventions and the Nullity of Arbitral Awards », *BYBIL*, 1928, p. 115.

[2] Telle qu'elle a été exprimée par A. de Lapradelle dans la *Revue de droit international*, 1928, n° 5, p. 5-64.

[3] W. E. Hall, *International Law*, 8e éd. (sous la direction de Pearce Higgins), 1924, p. 420.

and Oppenheim:

> "it is obvious that an arbitral award is only binding provided that the arbitrators have in every way fulfilled their duty as umpires . . . Should they have been bribed, or not followed their instructions . . . the award would have no binding force whatever." [1]

Among the prominent publicists who support the view that, where the arbitrators have proceeded without authority, their awards would carry no weight, are Vattel [2] and Phillimore [3].

Brierly points out that, although "it is undesirable that the complainant state should assume to decide the question of nullity for itself, and although agreements for a further reference to arbitration have sometimes been made by states in such a case" (for example, the *Orinoco Steamship Co.* case), "there is no warrant in law for saying that unless such a reference takes place . . . the complainant party is without remedy . . ." [4].

Further, although the Hague Conference, being unable to propose a satisfactory *procedure* for adjudicating on questions of nullity, thought it best to say nothing about the *substantive* law of nullity, it is to be noted that the report of chevalier Descamps showed that it hoped that when the Permanent Court of Arbitration came to be established States would come to use it for deciding allegations of nullity.

Although inconveniences and practical difficulties can result from the principle of absolute nullity there can thus be no theoretical difficulty in accepting the concept, even in the absence of a tribunal with competence to make the requisite declaration.

It would be difficult for a country to take it upon itself unilaterally to disregard a solemn international arbitration and to act in defiance of the presumption that the arbitral award is binding. As Brierly observes:

> "In practice also the fact that the appreciation of a cause of nullity is left to the state affected is not so grave a defect as it seems in principle. It is not easy for a state to refuse execution of an award on the ground of nullity, and instances where it has done so have been rare." [4]

In this case Guinea-Bissau has very properly sought to have an authoritative declaration of what it states is the legal position and has not chosen to act unilaterally on the basis of its own view.

Reference may also be made in this context to Judge Winiarski's indi-

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[1] L. Oppenheim, *International Law*, 4th ed., Vol. II, pp. 27-28.

[2] *Op. cit.*, pp. 223-224.

[3] R. J. Phillimore, *Commentaries upon International Law*, 3rd ed., Vol. 3 [1885], p. 3.

[4] *Op. cit.*, p. 116.

et Oppenheim :

> « il est évident qu'une sentence arbitrale n'est obligatoire qu'à condition que les arbitres se soient à tout point de vue acquittés de leur devoir en tant qu'arbitres... S'ils ont été corrompus ou n'ont pas suivi leurs instructions ... la sentence n'aura pas la moindre force obligatoire. »[1]

Parmi les éminents publicistes qui estiment que lorsque les arbitres ont agi sans autorité leur sentence ne sera d'aucun poids, on peut citer Vattel[2] et Phillimore[3].

Brierly fait observer que bien qu'« il ne soit pas souhaitable que l'Etat plaignant prenne sur lui de trancher par lui-même la question de la nullité, et bien qu'en pareil cas des Etats aient parfois conclu des accords en vue d'une nouvelle soumission à l'arbitrage » (par exemple dans l'affaire de l'*Orinoco Steamship Co.*), « il n'est pas justifié en droit de dire qu'en l'absence d'une telle soumission ... l'Etat plaignant est sans recours... »[4]

De plus, bien que la conférence de La Haye, incapable de proposer une *procédure* satisfaisante pour trancher les questions de nullité, ait préféré ne rien dire du *fond* du droit de la nullité, le rapport du chevalier Descamps montre qu'elle espérait que lorsque la Cour permanente d'arbitrage viendrait à être établie, les Etats l'utiliseraient pour statuer sur les allégations de nullité.

Bien que le principe de la nullité absolue puisse être source d'inconvénients et de difficultés pratiques, il n'existe ainsi aucune difficulté théorique qui empêche de l'accepter en tant que concept, même en l'absence d'un tribunal compétent pour faire la déclaration nécessaire.

Il serait difficile pour un pays de prendre unilatéralement la responsabilité de faire fi d'un arbitrage international solennel et d'agir au mépris de la présomption de validité qui s'attache à la sentence arbitrale. Comme Brierly fait observer :

> « Le fait que l'appréciation d'une cause de nullité est laissée à l'Etat affecté n'est pas en pratique un défaut aussi grave qu'il semble l'être en principe. Il n'est pas facile pour un Etat de refuser d'exécuter une sentence au motif qu'elle est nulle, et les cas où les Etats l'ont fait sont rares. »[4]

Dans la présente affaire, la Guinée-Bissau a très légitimement voulu obtenir une déclaration faisant autorité de ce qu'elle déclare être la situation juridique et elle n'a pas choisi d'agir unilatéralement en se fondant sur sa propre opinion.

On peut aussi citer dans ce contexte l'opinion individuelle de

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[1] L. Oppenheim, *International Law*, 4ᵉ éd., vol. II, p. 27-28.

[2] *Op. cit.*, p. 223-224.

[3] R. J. Phillimore, *Commentaries upon International Law*, 3ᵉ éd., vol. 3 [1885], p. 3.

[4] *Op. cit.*, p. 116.

vidual opinion in the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* case (*I.C.J. Reports 1954*, p. 65). That opinion, which has been described as the traditional view, was as follows:

> "An arbitral award, which is always final and without appeal, may be vitiated by defects which make it void; in this event, a party to the arbitration will be justified in refusing to give effect to it. This is not by virtue of any rule peculiar to ordinary arbitration between States; it is a natural and inevitable application of a general principle existing in all law: not only a judgment, but any act is incapable of producing legal effects if it is legally null and void." [1]

There does not therefore seem to be any logical difficulty in the concept of a court declaring a state of nullity to have existed prior to its declaration. Indeed such a declaration made in appropriate circumstances by a court possessed of the necessary jurisdiction is a powerful means of ensuring the integrity of international arbitration.

Was the failure to answer Question 2 the subject of a decision?

The Tribunal took the view that it was not called upon to reply to Question 2. Paragraph 87, which contains this information, is very tersely expressed:

> "*Bearing in mind* the above conclusions reached by the Tribunal and the *actual wording of Article 2* of the Arbitration Agreement, *in the opinion* of the Tribunal it is not called upon to reply to the second question." (Emphasis added.)

Does this constitute a decision? Did the Tribunal just happen to wander into a course of inaction or was there a considered decision not to act?

A decision is by definition the process of making up one's mind. One reaches thereby a conclusion which may or may not be formally expressed.

In *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1973*, p. 166), this Court dealt with the question whether an omission by a tribunal to exercise jurisdiction with respect to a certain submission made to it constituted a decision. The Court held (at p. 193) that the test was whether the Tribunal had addressed its mind to the matters on which the plea was based, and not the merely formal one of verifying whether the plea had been mentioned *eo nomine* in the substantive part of the judgment.

The question of failure to exercise jurisdiction came before this Court again in *Application for Review of Judgement No. 333 of the United Nations*

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[1] W. Michael Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards*, 1971, p. 423.

M. Winiarski dans l'affaire de l'*Effet de jugements du Tribunal administratif des Nations Unies accordant indemnité* (*C.I.J. Recueil 1954*, p. 65). Cette opinion, qui a été qualifiée d'opinion traditionnelle, était la suivante :

> « Une sentence arbitrale, qui est toujours définitive et sans appel, peut être entachée de nullité ; dans ce cas la partie à l'arbitrage est justifiée dans son refus de l'exécuter. Ceci n'est pas une règle propre au seul arbitrage ordinaire entre Etats ; c'est une application naturelle et inévitable du principe général de tout droit : non seulement un arrêt, mais aucun acte ne peut produire d'effets légaux s'il est juridiquement nul. »[1]

Il ne semble donc y avoir aucune difficulté logique à ce qu'un tribunal déclare qu'un état de nullité a existé avant sa déclaration. Une telle déclaration, faite dans des circonstances appropriées par un tribunal ayant la compétence nécessaire, contribuerait même puissamment à garantir l'intégrité de l'arbitrage international.

L'absence de réponse à la seconde question a-t-elle fait l'objet d'une décision ?

Le Tribunal a estimé qu'il n'avait pas à répondre à la seconde question. Il le dit au paragraphe 87 de la sentence de manière extrêmement concise :

> « *En tenant compte* des conclusions ci-dessus auxquelles le Tribunal est parvenu et *du libellé de l'article 2* du compromis arbitral, la deuxième question, *de l'avis* du Tribunal, n'appelle pas une réponse de sa part. » (Les italiques sont de moi.)

Ceci constitue-t-il une décision ? Le Tribunal s'est-il sans y penser laissé aller à l'inaction ou bien a-t-il pris une décision réfléchie de ne pas agir ?

Par définition, une décision est le processus consistant à arrêter son opinion. On parvient par ce processus à une conclusion qui peut être ou ne pas être exprimée formellement ou non.

Dans l'avis consultatif qu'elle a rendu sur la *Demande de réformation du jugement n° 158 du Tribunal administratif des Nations Unies* (*C.I.J. Recueil 1973*, p. 166), la Cour a traité de la question de savoir si le fait qu'un tribunal ait omis d'exercer sa juridiction à propos d'une certaine demande qui lui avait été présentée constituait une décision. La Cour a jugé (p. 193) que le critère était de savoir si le Tribunal avait fait porter sa réflexion sur les bases de la demande et qu'on ne saurait recourir aux critères purement formels qui consistent à s'assurer qu'elle figure nommément dans les motifs du jugement.

La question de l'omission d'exercer la juridiction a été à nouveau portée devant la Cour dans l'affaire de la *Demande de réformation du juge-*

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[1] W. Michael Reisman, *Nullity and Revision : The Review and Enforcement of International Judgments and Awards*, 1971, p. 423.

Administrative Tribunal (*I.C.J. Reports 1987*, p. 18) where, even in the absence of an express decision specifically rejecting or upholding the relevant contention, this Court found that the Tribunal clearly made a decision, though by implication (at p. 45). What was important was whether "the Tribunal addressed its mind" to the matters on which the contention was based "and drew its own conclusions therefrom" (at p. 44).

It thus seems clear beyond argument that there was a conscious decisional process involved, however terse the language used to describe it. The Tribunal has brought its mind to bear upon two factors — the conclusions it has already reached and the wording of Article 2. It has considered the bearing of one upon the other. It has formed an opinion. It has made up its mind that it will not decide the issue raised in Question 2. It has reached a decision.

The absence of amplified reasons does not take away from the fact that it is a decision. Whether ill- or well-considered, the decision not to answer an important question addressed to it — a decision not to act — was as much a decision as its converse.

That decision was one fraught with far-reaching consequences, for both the Parties and the Tribunal were aware that the disputes regarding the exclusive economic zone and the fishery zone were a vital part of the matters in contention between the Parties. The disputes would continue unabated if the arbitration left them unresolved. Hence the decision was not a decision only in the formal or semantic sense but one on which grave practical consequences turned. The step of not deciding Question 2 was indeed a decision and a momentous one at that.

A negative decision can constitute an excès de pouvoir

To quote Carlston, "the tribunal . . . derives its life and vitality from the *compromis*. Respect for its constitutive treaty is its cardinal rule of action." [1] Consequently, the *compromis* becomes the constant point of reference for the tribunal on every matter concerning its powers, duties and scope of action.

We have here a situation where a *compromis* calls upon the arbitrators to resolve a certain dispute. It maps out for them the area in which their determination is required. Its object and purpose are clear. The Parties to it have committed to the Tribunal the resolution of their entire dispute. The terms of the *compromis* are so drafted as to entitle the Parties to expect an order which will settle this troublesome matter finally and definitively. The essential outcome represents a clear conflict between the course mapped out in the *compromis* and that chosen by the Tribunal.

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[1] K. S. Carlston, *The Process of International Arbitration*, 1946, p. 64.

ment nº 333 du Tribunal administratif des Nations Unies (*C.I.J. Recueil 1987*, p. 18) où, même en l'absence d'une décision expresse rejetant ou acceptant spécifiquement la thèse pertinente, la Cour a jugé que le Tribunal avait nettement décidé, encore qu'implicitement (p. 45). Ce qui comptait, c'était de savoir si « le Tribunal avait fait porter sa réflexion » sur les éléments qui sous-tendaient cette thèse et en avait « tiré ses propres conclusions » (p. 44).

Il semble donc incontestable qu'il y a eu en l'espèce un processus de décision conscient, quelque abrupt qu'ait pu être le langage utilisé pour le décrire. Le Tribunal a réfléchi à deux facteurs — les conclusions auxquelles il était déjà parvenu et le libellé de l'article 2. Il a examiné leur effet réciproque. Il s'est formé une opinion. Il a décidé qu'il ne trancherait pas le problème soulevé à la seconde question. Il est parvenu à une décision.

L'absence de motifs très amples ne change pas le fait qu'il y a bien eu décision. Qu'elle fût mûrement réfléchie ou mal avisée, la décision du Tribunal de ne pas répondre à une question importante qui lui était posée — la décision de ne pas agir — était tout autant une décision que l'aurait été la décision opposée.

Cette décision avait des conséquences considérables, car tant les Parties que le Tribunal savaient que les différends relatifs à la zone économique exclusive et à la zone de pêche représentaient une part essentielle des questions en litige entre les Parties. Les différends subsisteraient avec autant d'acuité si l'arbitrage les laissait sans solution. Ainsi, la décision n'était pas une décision uniquement au sens formel ou sémantique, mais une décision qui avait des conséquences pratiques graves. La décision de ne pas répondre à la seconde question n'était pas seulement une décision : c'était une décision capitale.

Une décision négative peut constituer un excès de pouvoir

Pour citer Carlston, « le Tribunal ... tient son existence et sa vitalité du compromis. Le respect de son acte constitutif est sa principale règle de conduite. »[1] En conséquence, le compromis devient le point de référence constant pour le Tribunal sur toute question concernant ses pouvoirs, ses obligations et sa compétence.

En l'espèce, nous sommes en présence d'un compromis qui invite les arbitres à résoudre un certain différend. Il circonscrit pour eux le domaine dans lequel leur décision est requise. Son objet et son but sont clairs. Les Parties au compromis ont confié au Tribunal le règlement de la totalité de leur différend. Les termes du compromis sont ainsi libellés qu'ils autorisent les Parties à attendre une sentence qui règlera ce problème gênant de manière définitive. Pour l'essentiel, le résultat fait clairement ressortir un conflit entre la démarche envisagée dans le compromis et celle choisie par le Tribunal.

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[1] K. S. Carlston, *The Process of International Arbitration*, 1946, p. 64.

Senegal urged before us (public sitting of 5 April 1991, CR 91/4, pp. 60-61) that the omission to act, far from being an *excès de pouvoir*, is rather the non-exercise of a power which has been conferred and that "an omission is the very opposite of a usurpation".

This submission is not entitled to succeed. The negative fact of inaction ensues from and connotes an affirmative decision. Affirmative decisions attract the tests of *excès de pouvoir* and do not repel them or render them irrelevant merely because the decision is a decision not to act.

This is a conclusion confirmed both by high juristic authority and by the insights of modern analytical jurisprudence. Balasko enumerates the categories of *excès de pouvoir* in public international law as follows:

> "Il est bien entendu que l'excès de pouvoir du tribunal peut être commis non seulement par action, mais *par omission, par inaction, par abstention*, par manquement aux règles prescrites dans le compromis ou par la nature et le but de la fonction juridictionnelle. *Ainsi le tribunal doit juger tout point prévu au compromis*, fût-il d'avis qu'il n'y a pas lieu de l'examiner." [1]

A negative decision is thus clearly within the categories of decisions which can attract the principles of *excès de pouvoir*.

In the words of a detailed treatise on nullity and revision of international awards:

> "There can be little doubt that review competence extends to negative decisions: a decision either to disseise jurisdiction initially (for reasons of defective jurisdiction, inadmissibility, or lack of a showing of adequate 'legal interest') or to reject on grounds of the merits. In terms of value allocation, these decisions are indistinguishable from positive decisions; hence their grounds are equally susceptible to nullification. Indeed, the *Orinoco* case and the *Caracas* arbitrations were nullified because too little, and in some claims nothing at all, was decreed.
>
> From the standpoint of policy, no distinction should be drawn between positive and negative decisions. The conditions which necessitate review can obtain for both . . ." [2]

Much light is thrown on problems such as this by the insights of modern analytical jurisprudence especially in its researches on the semantics of legal language. Such studies as that of Julius Stone [3] have shown how semantic variations in the formulation of the self-same issue produce dif-

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[1] A. Balasko, *op. cit.*, p. 200; emphasis added.

[2] Reisman, *op. cit.*, pp. 441-442.

[3] *Legal System and Lawyers' Reasonings*, 1964, pp. 241 *et seq.*

Le Sénégal a argué devant nous (audience publique du 5 avril 1991, CR 91/4, p. 60-61) que loin de constituer un excès de pouvoir, le fait de ne pas agir représente le non-exercice d'un pouvoir qui a été conféré et qu'« une omission est l'opposé même d'une usurpation ».

Cette thèse ne saurait être accueillie. Le fait négatif que constitue l'inaction découle d'une décision positive et dénote une telle décision. Les décisions positives sont justiciables des principes de l'excès de pouvoir; ceux-ci ne sont pas écartés ni privés de pertinence pour la seule raison qu'une décision est une décision de ne pas agir.

Cette conclusion est confirmée tant par les plus éminents juristes que par la doctrine analytique la plus récente. Balasko énumère comme suit les catégories d'excès de pouvoir en droit international public:

> « Il est bien entendu que l'excès de pouvoir du tribunal peut être commis non seulement par action, mais *par omission, par inaction, par abstention*, par manquement aux règles prescrites dans le compromis ou par la nature et le but de la fonction juridictionnelle. *Ainsi le tribunal doit juger tout point prévu au compromis*, fût-il d'avis qu'il n'y a pas lieu de l'examiner. »[1]

Une décision négative entre donc à l'évidence dans les catégories de décisions auxquelles les principes de l'excès de pouvoir sont applicables.

Pour citer un traité très complet sur la nullité et la revision des sentences internationales:

> « Il n'est guère douteux que la compétence de revision s'étend aux décisions négatives: une décision soit de décliner d'emblée la compétence (pour incompétence, irrecevabilité ou défaut « d'intérêt légal ») soit de débouter pour des motifs de fond. En termes d'allocation de valeurs, ces décisions ne peuvent être distinguées des décisions positives; leurs motifs peuvent donc tout aussi bien être annulés. De fait, dans les affaires de l'*Orinoco* et des arbitrages de la *Commission mixte de Caracas*, les décisions ont été annulées parce qu'elles décidaient trop peu, et dans le cas de certaines demandes, rien du tout.
>
> Du point de vue des principes, il n'y a pas à distinguer entre décisions positives et décisions négatives. Les conditions qui nécessitent une revision peuvent exister pour les unes comme pour les autres... »[2]

Des problèmes tels que celui-ci s'éclairent beaucoup grâce aux idées de la doctrine analytique moderne, en particulier dans le domaine des recherches sur la sémantique de la langue juridique. Des études telles que celle de Julius Stone[3] ont montré comment des formulations verbales

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[1] A. Balasko, *op. cit*, p. 200; les italiques sont de moi.

[2] Reisman, *op. cit.*, p. 441-442.

[3] *Legal System and Lawyers' Reasonings*, 1964, p. 241 et suiv.

ferent legal answers if one permits the form of the question to overshadow its underlying meaning. One is not here asking whether the Tribunal acted affirmatively or did not act but whether the decision it took was one which it was or was not entitled to take. Following in the wake of research by distinguished jurists of both the common law and the civil law traditions, these explorations of the meaning of meaning stress the importance of the referent behind the form of words, rather than the words themselves.

The proposition that a decision not to act cannot constitute a usurpation of power is clearly untenable. The crucial question for decision is not whether there was action or inaction but whether the course followed, be it positive or negative, was so far out of alignment with the *compromis* as to constitute a serious departure therefrom.

Reisman in his study of nullity reflects this thinking when he observes:

> "Non-decision is simply a different form for articulating a substantive decision. A decision — a controlling value allocation — can, obviously, be articulated in many forms. Once an organized arena has been seised of a matter, however, it cannot escape decision. Its culminating behavior, whatever the manifest purport and form, will have value consequences . . . In particular, students should consider the full range of effects caused by clothing a substantive decision in the form of a non-decision . . .
>
> 'Decisions refusing to decide' — or 'nondecisions' — are real decisions no matter how they are characterized . . ." (*Op. cit.*, pp. 625-626.)

The decision not to answer Question 2 meant that the Tribunal was of its own accord releasing itself from a major portion of the task entrusted to it by the *compromis*. It departed from its terms, context and object. It also defeated the main purpose of arbitration in general, which is to resolve disputes, for it left even more unsettled than before the contentions between the Parties. It was not a decision the Tribunal was entitled to make under the treaty which was its charter of authority.

The absence or insufficiency of reasons

The necessity for reasons in an arbitral award is of course obvious as it removes any appearance of arbitrariness in the Tribunal's decision. It is a long-established and well-respected rule.

Article 31 of the International Law Commission's Model Rules on Arbitral Procedure, adopted by the Commission in 1958, states that, "The award shall state the reasons on which it is based for every point on which it rules."

différentes de la même question aboutissent à des réponses juridiques différentes si on laisse la forme de la question prendre le pas sur sa signification profonde. En l'occurrence, on ne se demande pas si le Tribunal a agi de façon positive ou s'il n'a pas agi mais si la décision qu'il a prise est une décision qu'il avait ou non le droit de prendre. Faisant suite aux travaux d'éminents juristes de traditions tant de *common law* que de droit civil, ces recherches sur le sens soulignent l'importance du référent occulté derrière les mots par rapport aux mots eux-mêmes.

La thèse selon laquelle une décision de ne pas agir ne peut constituer une usurpation de pouvoir est à l'évidence indéfendable. La question essentielle à trancher n'est pas de savoir s'il y a eu action ou inaction mais si la voie suivie, qu'elle soit positive ou négative, était si peu conforme au compromis qu'elle constituait un manquement grave à celui-ci.

Dans son étude consacrée à la nullité, Reisman développe ce point de vue lorsqu'il déclare:

> «La non-décision est simplement une manière différente de formuler une décision de fond. Une décision — une allocation de valeurs déterminante — peut à l'évidence être présentée sous diverses formes. Toutefois, une fois qu'une instance organisée a été saisie d'une question, elle ne peut échapper à une décision. Le point ultime de son comportement, quelles qu'en soient l'intention et la forme manifestes, aura des conséquences sur le plan des valeurs... En particulier, les étudiants devraient examiner l'ensemble des effets causés par la présentation d'une décision de fond sous la forme d'une non-décision...
>
> Les «décisions refusant de décider» — ou «non-décisions» — sont de véritables décisions, quelle que soit la manière dont on les qualifie...» (*Op. cit.*, p. 625-626.)

La décision de ne pas répondre à la seconde question signifiait que le Tribunal se soustrayait de son propre chef à une part importante de la tâche qui lui était confiée par le compromis. Elle constituait un manquement à ses termes, à son contexte et à son objet. Elle était également contraire à l'objectif principal de l'arbitrage en général, qui est de régler les différends, car elle laissait les différends entre les Parties encore moins résolus qu'auparavant. Ce n'était point une décision que le Tribunal avait le droit de prendre en vertu du compromis définissant ses pouvoirs.

L'absence ou l'insuffisance de motifs

La nécessité de motiver une sentence arbitrale est bien sûr évidente, car elle ôte toute apparence d'arbitraire à la décision du Tribunal. C'est une règle établie de longue date et respectée.

L'article 31 du modèle de règles sur la procédure arbitrale adopté en 1958 par la Commission du droit international dispose: «La sentence arbitrale doit être motivée sur tous les points.»

There have been occasional instances of major international arbitrations in which no reasons have been given for the award, as for instance in the *Portendick* arbitration of 1843 between France and Great Britain in which the arbitrator was the King of Prussia. However, such award without reasons immediately attracted criticism from learned publicists even at that early stage in the evolution of international arbitral law. The *Portendick* arbitration was criticized by Fauchille[1] and in 1897 when President Cleveland failed to give reasons for his decision in the *Cerruti* arbitration between Colombia and Italy, this was criticized by Darras[2].

Scelle, the eminent Special Rapporteur to the International Law Commission, referred in his report to the rule that a judgment should be accompanied by a statement of the reasons on which it is based. Describing this as a firmly established principle which had acquired the force of law, he added:

> "There would appear to be no point in stressing these undisputed principles here, and it is enough to emphasize the need for a statement of reasons. A judgment unaccompanied by a statement of reasons is not a judgment, but a mere opinion."[3]

In the case of the *King of Spain's Award*, one of the grounds of nullity urged by Nicaragua was that there was an inadequacy of reasons given by the arbitrator in support of his conclusions. However the Court held that the award dealt in logical order and in some detail with all the relevant considerations and that it contained ample reasoning and explanations in support of the arbitrator's conclusions. The allegation was therefore rejected.

In the present case, the Tribunal has set out rather scantily the factors which weighed with it in reaching its decision not to answer Question 2. No reason has been given in respect of its decision not to append a map, beyond a reliance on its decision not to address Question 2.

This seems unsatisfactory. Yet it does not follow that these circumstances by themselves are sufficient to ground a finding of nullity. The Tribunal has, however scantily, set out some reasons for its decision and it is not necessary to consider this matter further, as other grounds exist for a finding of nullity. However, it is to be hoped, in the interests of proper arbitral practice, that such inadequate statements of reasons will not be looked upon in the future as adequate foundations on which to rest important portions of an award.

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[1] Doctrinal note in de Lapradelle and Politis, *Recueil des arbitrages internationaux*, Vol. 1, pp. 543-544.

[2] *Revue générale de droit international public*, 1899, Vol. 6, p. 547.

[3] Scelle, *Report on Arbitration Procedure*, A/CN.4/18, 21 March 1950, p. 67.

Il est arrivé que dans certaines grandes affaires d'arbitrage international les sentences n'aient pas été motivées, comme par exemple dans l'affaire *Portendick* (1843) entre la France et la Grande-Bretagne dans laquelle l'arbitre était le roi de Prusse. Toutefois, cette sentence, non motivée, a immédiatement suscité les critiques de publicistes éminents, alors même que l'évolution du droit international de l'arbitrage n'en était qu'à ses débuts. La sentence rendue dans l'affaire *Portendick* a été critiquée par Fauchille[1], et lorsqu'en 1897 le président Cleveland n'a pas motivé sa sentence dans l'affaire *Cerruti* opposant la Colombie et l'Italie, il s'est attiré les critiques de Darras[2].

Scelle, l'éminent rapporteur spécial de la Commission du droit international, rappelle dans son rapport la règle selon laquelle une sentence doit être motivée. En qualifiant ces règles de « choses acquises et passées en « force de droit », il a ajouté :

> « Il paraît sans intérêt d'insister sur des points hors de contestation et suffisant de souligner la clause de la motivation. Une sentence non motivée n'est pas une sentence, mais une simple opinion. »[3]

Dans l'affaire de la *Sentence arbitrale rendue par le roi d'Espagne*, l'un des motifs de nullité invoqués par le Nicaragua était que l'arbitre n'avait pas suffisamment motivé ses conclusions. La Cour a toutefois considéré que la sentence traitait en ordre logique et avec quelque détail de toutes les considérations pertinentes et que les conclusions de l'arbitre étaient fondées sur un raisonnement et des explications suffisants. Le grief a donc été jugé sans fondement.

Dans la présente affaire, le Tribunal a exposé de manière plutôt succincte les facteurs qui l'ont amené à prendre sa décision de ne pas répondre à la seconde question. Il n'a donné aucun motif en ce qui concerne sa décision de ne pas annexer de carte, se contentant d'une référence à sa décision de ne pas répondre à la seconde question.

Cela ne semble pas satisfaisant. Mais il ne s'ensuit pas que ces circonstances, en elles-mêmes, soient suffisantes pour fonder une décision de nullité. Pour succinctement qu'il l'ait fait, le Tribunal a bien exposé certains motifs de sa décision et il n'est pas nécessaire d'examiner la question plus avant, puisque d'autres motifs existent pour conclure à la nullité. Toutefois, il est à espérer, dans l'intérêt d'une pratique arbitrale correcte, que des motivations inadéquates de ce genre ne seront pas considérées à l'avenir comme des bases suffisantes sur lesquelles fonder des éléments importants d'une sentence.

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[1] Note doctrinale dans de Lapradelle et Politis, *Recueil des arbitrages internationaux*, vol. 1, p. 543-544.

[2] *Revue générale de droit international public*, 1899, vol. 6, p. 547.

[3] Scelle, *Yearbook of the International Law Commission*, 1950, vol. II, A/CN.4/18, 21 mars 1950, p. 139.

The principle of compétence de la compétence

It has been argued in this case that questions of interpretation of the *compromis* are a matter for the Tribunal itself and that questions of its powers and jurisdiction are within its exclusive domain. The principle invoked is the principle of *compétence de la compétence.*

This principle, which is in tension with the principle *extra compromissum arbiter nihil facere potest*[1], evolved at an early stage of the development of international arbitration as a necessary attribute of the independence of arbitrators. Though they were nominees of the contending parties they needed to shake themselves clear of any appearance of continuing dependence on their principals in regard to matters concerning the scope of their arbitral powers. When a dispute arose as to the interpretation of the clause conferring jurisdiction upon them, this was therefore treated as a matter entirely for the arbitrators, and rightly so.

The rule of *compétence de la compétence,* now well recognized in international law, is embodied in Article 6, paragraph 6, of the Statute of this Court and in Article 10 of the Model Rules on Arbitral Procedure, 1958, of the International Law Commission[2].

The rule was clearly enunciated by the Permanent Court of International Justice in its Advisory Opinion in the *Interpretation of the Greco-Turkish Agreement of 1 December 1926:*

> "it is clear — having regard amongst other things to the principle that, as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction — that questions affecting the extent of the jurisdiction of the Mixed Commission must be settled by the Commission itself without action by any other body being necessary" (*P.C.I.J., Series B, No. 16,* p. 20).

Yet there must naturally be limits upon this principle as Senegal itself has so properly recognized in its Counter-Memorial in the present proceedings in paragraph 64 of which it states:

> "It is nevertheless true — and Guinea-Bissau is right on this point — that a court's jurisdiction over its own competence is not unlimited: the court may thus not usurp powers which manifestly do not follow from the text of the jurisdictional clause, interpreted in the light of the relevant principles of international law. If a court were thus to exceed its powers, the result would be to render its decision null and void in whole or in part."

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[1] Jennings, *op. cit.,* pp. 83-84.

[2] See also J. H. Ralston, *International Arbitral Law and Procedure,* 1910, pp. 21 *et seq.*; and C. Rousseau, *Droit international public,* Vol. V: *Les rapports conflictuels,* 1983, No. 311, p. 323.

Le principe de la compétence de la compétence

Il a été soutenu en l'espèce que les questions d'interprétation du compromis relevaient du Tribunal lui-même et que lui seul était juge de ses pouvoirs et de sa compétence. Le principe invoqué est celui de la compétence de la compétence.

Ce principe, qui est en conflit avec l'adage *extra compromissum arbiter nihil facere potest*[1], est apparu tôt dans le développement de l'arbitrage international en tant qu'attribut nécessaire de l'indépendance des arbitres. Bien que ces derniers fussent nommés par les parties adverses, il fallait qu'ils se départissent de toute apparence de dépendance à l'égard de leurs mandants relativement aux questions concernant la portée de leurs pouvoirs d'arbitres. Tout différend quant à l'interprétation de la clause attribuant compétence aux arbitres était donc considéré comme relevant entièrement de leurs attributions, et ce à juste titre.

La règle de la compétence de la compétence, aujourd'hui bien établie en droit international, est consacrée à l'article 6, paragraphe 6, du Statut de la Cour et à l'article 10 du modèle de règles sur la procédure arbitrale (1958) adopté par la Commission du droit international[2].

Cette règle a été clairement énoncée par la Cour permanente de Justice internationale dans son avis consultatif relatif à l'*Interprétation de l'accord gréco-turc du 1er décembre 1926*:

> «il est clair — en tenant compte notamment du principe suivant lequel, en règle générale, tout organe possédant des pouvoirs juridictionnels a le droit de se prononcer en premier lieu lui-même sur l'étendue de ses attributions dans ce domaine — que les questions touchant l'étendue de la juridiction de la commission mixte doivent être résolues par la commission elle-même sans que l'intervention d'une autre instance quelconque soit nécessaire». (*C.P.J.I. série B nº 16*, p. 20.)

Il existe pourtant des limites à ce principe, comme le Sénégal l'a si justement reconnu au paragraphe 64 de son contre-mémoire en la présente instance:

> «Il est toutefois vrai, et l'on doit suivre la Partie adverse sur ce point, que la compétence de la compétence d'un tribunal n'est pas illimitée: un tribunal ne saurait en effet usurper des pouvoirs qui, manifestement, ne ressortent pas du texte du titre de compétence interprété à la lumière des principes pertinents du droit international. L'excès de pouvoirs ainsi commis par le tribunal peut entraîner la nullité totale ou partielle de sa décision.»

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[1] Jennings, *op. cit.*, p. 83-84.

[2] Voir aussi J. H. Ralston, *International Arbitral Law and Procedure*, 1910, p. 21 et suiv.; et C. Rousseau, *Droit international public*, vol. V: *Les rapports conflictuels*, 1983, nº 311, p. 323.

A standard work on international arbitration [1] explains that the principle would not apply to an award based on an assumption of powers which clearly could not be justified on any legitimate process of interpretation of the *compromis.* Nor would it apply if it could be shown for example that the Tribunal had not directed its mind to the question on which its jurisdiction depended. The authors conclude:

> "The rule that a tribunal has jurisdiction to decide its jurisdiction therefore does not mean that its decision is conclusive. There is no conflict between the two rules; the first rule has to be read as subject to the second. In practice difficulty arises, not from the alleged conflict between the two rules, but from the lack of any generally available means of determining objectively whether the conduct of the tribunal has been such as to justify the application of the second rule." [2]

These considerations go to the very heart of the *compromis.* What was the matter which was committed to the Tribunal for decision? Was it the entire maritime dispute or only a part thereof? Did it accord with the object and purpose of the *compromis* that the Tribunal should address only part of this question and leave a major part unanswered? These issues clearly touch the very fundamentals of the Tribunal's authority. A decision which manifestly goes beyond the authority conferred by Article 2 is not in my view saved by the principle of *compétence de la compétence.*

The principle of severability

The preceding discussion has led to the conclusion that the Award is so fundamentally flawed as to be a nullity. One question yet remains for examination and that is whether such nullity applies only to the decision not to demarcate the boundaries of the exclusive economic zone and the fishery zone or whether it applies also to the decision in regard to the three zones which the Tribunal did in fact demarcate.

There is more than one reason why every endeavour should be made to preserve the integrity of that latter decision. In the first place, it was within the subject-matter committed to the Tribunal for decision and, from the point of view of formal jurisdiction, was untouched by the taint of *excès de pouvoir.* Secondly, in the interests of achieving an end to litigation, it can be urged that it determines at least some contentious issues and clears the decks so to speak for the future determination of the remaining issues. In the third place, a duty lies upon the court making the declaration of nullity to keep to a minimum the scope of that nullity.

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[1] J. L. Simpson and Hazel Fox, *International Arbitration: Law and Practice,* 1959, p. 252.

[2] *Ibid.*; see also Lauterpacht, *op. cit.*, p. 117.

L'un des ouvrages classiques sur l'arbitrage international [1] explique que le principe ne s'appliquerait pas à une sentence découlant de l'exercice de pouvoirs qu'à l'évidence aucun processus légitime d'interprétation du compromis ne pourrait justifier. Il ne s'appliquerait pas non plus s'il pouvait être démontré par exemple que le tribunal ne s'est pas attaché à examiner la question sur laquelle reposait sa compétence. Les auteurs concluent :

> « La règle selon laquelle un tribunal a compétence pour décider de sa compétence ne signifie donc pas que sa décision est finale. Il n'y a pas de conflit entre les deux règles ; la première règle doit être lue sous réserve de la seconde. Des difficultés se posent en pratique non à cause du prétendu conflit entre les deux règles mais de l'absence de moyens généralement reconnus de déterminer objectivement si la conduite du tribunal a été telle qu'elle justifie l'application de la seconde règle. » [2]

Ces considérations touchent au cœur même du compromis. Quel était le problème soumis au Tribunal pour décision ? Etait-ce l'ensemble du différend maritime ou une partie seulement de celui-ci ? En n'examinant qu'une partie de la question et en en laissant une grande partie sans réponse, le Tribunal a-t-il agi conformément à l'objet et au but du compromis ? Ces questions touchent clairement aux fondements mêmes du pouvoir du Tribunal. Une décision qui, manifestement, outrepasse le pouvoir conféré par l'article 2 n'est pas, à mon avis, rachetée par le principe de la compétence de la compétence.

Le principe de la séparabilité

L'examen qui précède a conduit à la conclusion que la sentence est si fondamentalement viciée qu'elle est nulle. Toutefois, une question doit encore être examinée, celle de savoir si cette nullité s'applique seulement à la décision de ne pas délimiter la zone économique exclusive et la zone de pêche ou si elle s'applique aussi à la décision relative aux trois zones que le Tribunal a effectivement délimitées.

Il y a plus d'une raison pour laquelle tout doit être mis en œuvre pour préserver l'intégrité de cette dernière décision. En premier lieu, elle rentrait dans l'objet du différend soumis au Tribunal pour décision et, du point de vue de la compétence formelle, n'était pas viciée par le grief d'excès de pouvoir. En second lieu, dans l'intérêt de mettre fin au procès, l'on peut faire valoir que la décision règle tout au moins certains des points litigieux et, pour ainsi dire, fait place nette pour les futures décisions concernant les problèmes qui demeurent. En troisième lieu, la juridiction qui prononce la nullité a l'obligation de limiter au minimum la portée de cette nullité.

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[1] J. L. Simpson et Hazel Fox, *International Arbitration : Law and Practice*, 1959, p. 252.

[2] *Ibid.* ; voir aussi Lauterpacht, *op. cit.*, p. 117.

These are powerful considerations moving the Court in the direction of upholding the Tribunal's determination of the territorial sea, the contiguous zone and the continental shelf.

Yet, there is an overriding principle which prevents the Court from giving effect to the considerations just mentioned and that is the principle that serious prejudice must not be caused to either party in consequence of the erroneous decision to make only a partial determination. Much though a court should strive to uphold the decisions made within the tribunal's formal authority, this result should not be achieved at the cost of substantial damage to the interests which the parties had submitted to the tribunal for decision.

The principle of severability holds the key to the determination of this question of prejudice. Can the issues already decided be severed from those awaiting determination without prejudice to the interests of one party or the other? Are the issues involved so intrinsically connected that the known answer will cramp the free determination of the unknown by wielding a significant influence upon it? If so, this course of salvage of the partial solution becomes unacceptable and difficult to square with principles of justice and equity. The later decision may then be said to be pre-empted in whole or in part by the earlier.

One could of course visualize a case where, though the various questions are interrelated, the substantial dispute is answered but some inconsequential portions of the dispute remain unanswered. One would not be justified in such a situation in treating the minor omission as invalidating the entire decision. However, that is clearly not the case in the matter before us.

There are also cases, including boundary disputes, where different segments of the total matter in dispute can be decided as separate and discrete problems, the answers to which can stand independently of each other. In such cases the segments of the dispute that have been properly determined can maintain their integrity though the findings on other segments are assailed or do not exist. Such was the position in the *Argentine-Chile Frontier Award* case of 1902 and the *Orinoco Steamship Co.* case of 1910 [1]. In the former, a portion of the boundary between two boundary posts needed further determination while the findings in regard to the rest of the boundary could still remain intact. In the latter a series of separable and discrete claims could be separately adjudicated upon without the findings on one of them being interlinked with those on the others.

If, on the other hand, the different component elements of the subject-matter are inextricably interlinked, we face difficulties in attempting to

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[1] 16 *Reports of International Arbitral Awards* 109 and 11 *ibid.* 237, at p. 238, respectively.

Ce sont là des arguments de poids qui conduiraient la Cour à confirmer la décision du Tribunal concernant la mer territoriale, la zone contiguë et le plateau continental.

Pourtant, il est un principe prééminent qui empêche la Cour de donner effet aux considérations qu'on vient de mentionner : aucune des parties ne doit subir un préjudice grave du fait qu'il a été décidé à tort de ne rendre qu'un jugement partiel. S'il est vrai qu'une juridiction doit s'efforcer de confirmer les décisions prises conformément aux pouvoirs formels du tribunal, un tel résultat ne doit pas être obtenu au prix d'un préjudice substantiel aux intérêts que les parties avaient soumis à la décision du tribunal.

Le principe de la séparabilité est la clé qui permet de décider cette question du préjudice. Les questions déjà tranchées peuvent-elles être séparées de celles qui attendent une décision sans causer un préjudice aux intérêts d'une partie ou de l'autre? Les problèmes en cause sont-ils si intrinsèquement interdépendants que la réponse connue, en influant nettement sur l'élément inconnu, empêchera de le déterminer librement? Si tel est le cas, cette tentative de «sauvetage» de la solution partielle devient inacceptable et difficile à concilier avec les principes de justice et d'équité. On pourrait alors dire que la décision à venir a été, en tout ou en partie, prédéterminée par la première.

Certes, on peut aussi imaginer le cas d'un différend dont l'essentiel a été réglé mais dont certains détails sans conséquence restent en suspens, alors même que ses divers aspects sont liés. Il ne serait pas justifié, en pareil cas, de traiter une omission mineure comme invalidant l'ensemble de la décision. Mais, dans l'affaire qui nous est soumise, tel n'est évidemment pas le cas.

Il est aussi des affaires, y compris de différends frontaliers, dans lesquelles les divers éléments de l'ensemble de la question en litige peuvent être traités comme des problèmes séparés et distincts, auxquels les réponses qu'on apporte valent indépendamment les unes des autres. Dans de telles affaires, les parties du différend sur lesquelles il a été régulièrement statué conservent leur intégrité alors même que les conclusions auxquelles on est parvenu sur d'autres parties sont contestées ou inexistantes. Telle était la situation qui existait dans les affaires de l'*Argentine-Chile Frontier Award* de 1902 et de l'*Orinoco Steamship Co.* de 1910[1]. Dans la première, une partie de la frontière entre deux postes frontière devait faire l'objet d'une nouvelle délimitation alors que les conclusions concernant le reste de la frontière pouvaient demeurer intactes. Dans la deuxième, une série de demandes séparables et distinctes pouvaient être jugées séparément sans que les décisions les concernant respectivement soient liées entre elles.

Si, en revanche, les différents éléments qui composent le différend sont inextricablement liés, il devient difficile de vouloir maintenir une

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[1] *Recueil des sentences arbitrales*, vol. 16, p. 111, et *ibid.*, vol. 11, p. 238.

uphold a partial award. One test would be to examine the practicalities of the later decisional process. With a line already drawn and unalterable, would the later tribunal be as free as it would be in the absence of such a line to take into consideration all relevant facts and make an equitable order determining the exclusive economic zone and the fishery zone? Are all the factors relevant to the different zones a composite group whose subtle interaction upon each other cannot take place if the zones are compartmentalized and separately determined? If the overall result is to prevent a free and untrammelled resolution of the remaining areas of the dispute, the option of preserving the existing decision ceases to be available.

Needless to say, the task of delimitation of maritime boundaries as important as those of the exclusive economic zone and the fishery zone, is a delicately balanced one involving a plethora of factors — geological, geomorphological, ecological and economic, among others — which must be taken into account. Special circumstances such as islands, rocks and coastline irregularities have to be considered. Developing principles of law and equity [1], fine-tuned to meet the needs of the particular case, have to be sensitively applied. Thus alone can a fair and equitable result be achieved. The possible interlinkages are too numerous to be visualized or itemized in advance.

We should remind ourselves in this connection that:

> "The fundamental rule of general international law governing maritime delimitations . . . requires that the delimitation line be established while applying equitable criteria to that operation, with a view to reaching an equitable result." (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 339, para. 230.)

Far from the complex mix of decisional factors blending into a harmonious and equitable result, we will have the second tribunal functioning within a straitjacket imposed upon it by a fixed and unalterable boundary governing the territorial sea, the contiguous zone and the continental shelf. For these reasons, this Court cannot conclude with any degree of assurance that the interests of Guinea-Bissau would not be prejudiced by the piecemeal process that will take the place of the composite process both parties had in mind.

Is that prejudice substantial or can we overlook it in the interests of salvaging that part of the boundary determination that has already been made? From a practical point of view, it can hardly be said that the riches of the sea in such key areas as the exclusive economic zone and the fishery zone are anything but a most vital resource for any country, developed

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[1] See P. Bravender-Coyle, "The Emerging Legal Principles and Equitable Criteria Governing the Delimitation of Maritime Boundaries between States" [1988], 19 *Ocean Development and International Law*, pp. 171-227.

sentence partielle. Une solution consisterait à examiner les aspects pratiques du processus de décision ultérieur. En présence d'une ligne déjà tracée et inaltérable, le second tribunal serait-il aussi libre qu'il l'aurait été, en l'absence d'une telle ligne, de prendre en considération tous les faits pertinents et de rendre une décision équitable délimitant la zone économique exclusive et la zone de pêche? Tous les facteurs liés aux différentes zones constituent-ils un groupe composite à l'intérieur duquel leur interaction subtile est impossible si les zones sont compartimentées et délimitées séparément? Si l'effet global de cette solution est d'empêcher un règlement libre et sans entrave de ce qui reste du différend, la faculté de maintenir la décision existante disparaît.

Il va sans dire que la tâche consistant à délimiter les frontières maritimes aussi importantes que celles de la zone économique exclusive et de la zone de pêche est un équilibre subtil qui fait intervenir une multitude de facteurs — géologiques, géomorphologiques, écologiques et économiques, entre autres — qui doivent être pris en considération. Il faut tenir compte de circonstances spéciales comme la présence d'îles, de rochers et d'irrégularités du littoral. Les principes naissants du droit et de l'équité [1], judicieusement adaptés aux exigences de l'espèce, doivent être appliqués avec doigté. Ce n'est qu'ainsi que l'on peut parvenir à un résultat juste et équitable. Les liens possibles sont trop nombreux pour pouvoir être envisagés ou précisés à l'avance.

A ce propos, nous devons nous rappeler que:

> « La règle fondamentale du droit international général régissant la matière des délimitations maritimes ... exige que la ligne de délimitation soit établie en appliquant à cette opération des critères équitables, et ceci en vue de parvenir à un résultat équitable. » (*Délimitation de la frontière maritime dans la région du golfe du Maine, C.I.J. Recueil 1984*, p. 339, par. 230.)

Loin d'avoir une combinaison complexe d'éléments de décision se conjuguant pour parvenir à un résultat harmonieux et équitable, le deuxième tribunal devra fonctionner à l'intérieur du carcan que lui impose une ligne de démarcation fixe et inaltérable de la mer territoriale, de la zone contiguë et du plateau continental. Pour ces raisons, la Cour ne peut pas raisonnablement être certaine que le processus fragmentaire qui se substituera au processus composite que les Parties avaient à l'esprit ne portera pas préjudice aux intérêts de la Guinée-Bissau.

Ce préjudice est-il substantiel ou pouvons-nous le négliger dans le souci de « sauver » la partie de la frontière qui a déjà été déterminée? D'un point de vue pratique, il est difficilement contestable que les richesses de la mer dans des secteurs aussi importants que la zone économique exclusive et la zone de pêche constituent des ressources d'une importance tout à fait

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[1] Voir P. Bravender-Coyle, « The Emerging Legal Principles and Equitable Criteria Governing the Delimitation of Maritime Boundaries between States » [1988], *Ocean Development and International Law*, n° 19, p. 171-227.

and developing alike. The determination of their boundaries within the framework of such pre-set constraints clearly causes a degree of prejudice too great to be overlooked in the interests of salvaging the Award. Indeed, it would be pertinent to note that the maritime wealth of the exclusive economic zone and the fishery zone would, for both Parties to this particular dispute, constitute a far greater proportion of their total national asset than the disputed maritime zones would have involved, for example, for the United States of America and Canada in the *Gulf of Maine* case or for the Federal Republic of Germany, Denmark and the Netherlands in the *North Sea Continental Shelf* cases, to quote just two examples of cases of significant importance in the jurisprudence of the Court. For the parties concerned, the issues were momentous and any interference with their fair determination a matter of grave concern. The prejudice involved, by determining the later issues within the framework of the first decision, is thus too great to be overlooked in the interests of preserving the partial award.

A consideration of the question of severability would be incomplete without examining the possibility of different lines being drawn in regard to different boundaries. This in itself is a vast question, the complexities of which cannot at this point be envisaged. It is relevant to note in this context that in more than one place the *compromis* speaks of *the* boundary line which the Tribunal will draw, thus showing no contemplation of more than one. One line drawn at 240° for the zones already determined and another at another angle for those yet to be determined does not seem to accord with this language. Else there could be a resulting situation, for example, of the continental shelf following the 240° line and the exclusive economic zone following another. Whether such a situation, even if it is possible in law, is feasible in reality, this Court is not called upon to determine here. All that is possible at this stage is to make a brief reference to the jurisprudence of this Court. Such a reference will reveal a problem so complex that it is not possible to point to a later determination as affording Guinea-Bissau a way out of the impasse in which it finds itself if the territorial sea, the contiguous zone and the continental shelf are to be treated as already fixed and determined.

The *Gulf of Maine* case, the first in which the Court was asked to draw a delimitation line itself[1], was also of special significance as the Court was asked to delimit *both* the continental shelf *and* the exclusive fishery zone by a *single* boundary.

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[1] As opposed to indicating the applicable principles and rules of international law as in the *North Sea Continental Shelf, I.C.J. Reports 1967*, pp. 3 and 6, and *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 18.

vitale pour tout pays, qu'il soit développé ou en développement. La détermination de la frontière sur la base de contraintes ainsi préétablies causerait manifestement un préjudice trop grand pour être négligé dans le souci de sauvegarder la sentence. Il convient d'ailleurs de noter à ce propos que les richesses que renferment les eaux de la zone économique exclusive et de la zone de pêche constituent pour les deux Parties à ce différend une proportion bien plus grande de leur patrimoine national total que celle représentée par les zones maritimes constestées, par exemple, entre les Etats-Unis d'Amérique et le Canada dans l'affaire de la *Délimitation de la frontière maritime dans la région du golfe du Maine* ou de la République fédérale d'Allemagne, du Danemark et des Pays-Bas dans les affaires du *Plateau continental de la mer du Nord*, pour ne citer que deux exemples particulièrement importants dans la jurisprudence de la Cour. Pour les Parties en cause, l'enjeu était considérable et toute ingérence dans le juste règlement de leur différend une cause de profonde préoccupation. Le préjudice qu'entraînerait un règlement des points en suspens dans le cadre de la première décision est par conséquent trop grand pour pouvoir être négligé dans l'intérêt d'une sauvegarde de la sentence partielle.

L'analyse de la question de la séparabilité serait incomplète si l'on n'examinait pas la possibilité de tracer des lignes différentes pour des zones différentes. Il s'agit là d'une question extrêmement vaste dont les complexités ne peuvent pas être envisagées à ce stade. Il convient néanmoins de relever dans ce contexte qu'à plus d'une occasion le compromis parle de *la* ligne frontière que devra tracer le Tribunal, n'en envisageant par conséquent pas plus d'une. Il ne semble pas que le fait de tracer une ligne d'azimut de 240° pour les zones déjà déterminées et une autre ligne d'un autre angle pour les zones restant à déterminer serait conforme à ces dispositions. Tout cela pourrait aboutir à une situation telle, par exemple, que la ligne de délimitation du plateau continental serait orientée à 240° et que la ligne de délimitation de la zone économique exclusive aurait un autre azimut. La Cour n'est pas appelée, en l'occurrence, à déterminer si une telle situation, même si elle est possible en droit, le serait dans la réalité. Tout ce que l'on peut faire, à ce stade, c'est examiner brièvement la jurisprudence de la Cour. Cet examen fait apparaître un problème si complexe qu'il n'est pas possible d'envisager une décision ultérieure qui permettrait à la Guinée-Bissau de sortir de l'impasse dans laquelle elle se trouve si la mer territoriale, la zone contiguë et le plateau continental doivent être considérés comme ayant déjà été délimités et déterminés.

L'affaire de la *Délimitation de la frontière maritime dans la région du golfe du Maine*, qui est la première dans laquelle la Cour a été invitée à tracer elle-même une ligne de délimitation [1], revêt aussi une importance toute particulière en ce sens que la Cour a été priée de délimiter *à la fois* le plateau continental et la zone exclusive de pêche au moyen d'une frontière *unique*.

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[1] Plutôt que d'indiquer les principes et les règles de droit international applicables, comme dans les affaires du *Plateau continental de la mer du Nord, C.I.J. Recueil 1967*, p. 3 et 6, et du *Plateau continental (Tunisie/Jamahiriya arabe libyenne), C.I.J. Recueil 1982*, p. 18.

The problems attendant on treating each separate boundary as a matter for separate enquiry become apparent from the Judgment, for, after acknowledging that separate criteria may be appropriate and equitable for the determination of the two areas involved, the Chamber goes on to state:

> "In other words, the very fact that the delimitation has a twofold object constitutes a special aspect of the case *which must be taken into consideration even before proceeding to examine the possible influence of other circumstances on the choice of applicable criteria.* It follows that, whatever may have been held applicable in previous cases, it is necessary, in a case like the present one, to *rule out the application of any criterion found to be typically and exclusively bound up with the particular characteristics of one alone* of the two natural realities that have to be delimited in conjunction." (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 326, para. 193; emphasis added.)

The fact that the determination of separate boundaries in hermetically sealed compartments produces different results from those that follow when they are dealt with as a collectivity thus receives authoritative endorsement.

The Chamber goes on to observe that:

> "it can be foreseen that with the gradual adoption by the majority of maritime States of an exclusive economic zone and, consequently, an *increasingly general demand for single delimitation, so as to avoid as far as possible the disadvantages inherent in a plurality of separate determinations*, preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation" (p. 327, para. 194; emphasis added).

This judicial confirmation of the differences between a composite determination and a plurality of separate determinations, and of the disadvantages of the latter, further establishes the necessary interlinkage between the partial award that has been made and the residual award yet to come. The second can scarcely be effected in isolation from the first.

The tendency to make the determination of the exclusive economic zone coincide with that of the continental shelf is another factor crippling freedom of decision in the course to which Guinea-Bissau would be committed if she were to be sent to another decisional process while preserving the demarcation of the continental shelf. As Judge Jiménez de Aréchaga observed in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*:

> "At least in the large majority of normal cases, the delimitation of the Exclusive Economic Zone and that of the continental shelf would

Les problèmes que susciterait le fait de considérer chaque frontière distincte comme devant faire l'objet d'une étude distincte ressortent de l'arrêt, car la Chambre, après avoir reconnu que des critères distincts peuvent être appropriés et équitables pour délimiter les deux zones en question, poursuit en disant :

> « En d'autres termes, dans le fait que la délimitation a un double objet, il y a une particularité du cas d'espèce *qui doit être prise en considération avant même de passer à l'examen de l'incidence possible d'autres circonstances sur le choix des critères à appliquer.* Il en découle donc qu'abstraction faite de ce qui a pu avoir été retenu dans des affaires précédentes il conviendrait d'*exclure l'application*, dans un cas comme celui-ci, *d'un quelconque critère qui apparaîtrait typiquement et exclusivement lié aux caractéristiques propres d'une seule* des deux réalités naturelles à délimiter ensemble. » (*Délimitation de la frontière maritime dans la région du golfe du Maine, C.I.J. Recueil 1984*, p. 326, par. 193 ; les italiques sont de moi.)

Le fait que la détermination de frontières distinctes dans des compartiments hermétiquement scellés aboutit à des résultats différents de ceux que l'on obtient lorsque ces secteurs sont considérés comme un tout est par conséquent confirmé par une source digne de foi.

La Chambre fait observer ensuite que :

> « il est d'ailleurs à prévoir que, avec l'adoption progressive, par la plupart des Etats maritimes, d'une zone économique exclusive et, par conséquent, avec la *généralisation de la demande d'une délimitation unique, évitant autant qu'il est possible les inconvénients inhérents à une pluralité de délimitations distinctes*, la préférence ira désormais, inévitablement, à des critères se prêtant mieux, par leur caractère plus neutre, à une délimitation polyvalente » (p. 327, par. 194 ; les italiques sont de moi).

Cette confirmation judiciaire des différences qui résultent d'une détermination composite et de plusieurs déterminations séparées ainsi que des inconvénients de cette dernière formule met encore plus en relief le lien qui doit nécessairement exister entre la sentence partielle déjà rendue et la sentence résiduelle à venir. La seconde ne peut guère être rendue indépendamment de la première.

La tendance à faire coïncider la délimitation de la zone économique exclusive avec celle du plateau continental est un autre facteur qui entrave la liberté de décision pour ce qui est de la démarche que la Guinée-Bissau devrait suivre si elle devait être renvoyée devant une autre juridiction tout en maintenant la délimitation du plateau continental. Comme M. Jiménez de Aréchaga l'a fait observer dans l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)* :

> « La délimitation de la zone économique exclusive et la délimitation du plateau continental coïncideront, tout au moins dans la très

> have to coincide. The reason is that both of these delimitations are governed by the same rules ..." (*I.C.J. Reports 1982*, pp. 115-116, para. 56.)

So, also, Judge Evensen referred in the same case, to "the obvious advisability of having identical lines of delimitation for the continental shelf and the 200-mile Exclusive Economic Zone" (at p. 319).

It is not necessary to enter here into all the complexities of these processes, suffice it merely to note them for the limited purposes of this opinion. Some understanding of the extent of these complexities appears also from a perusal of the dissenting opinion of Judge Gros in the *Gulf of Maine* case, and from the writings of Judge Oda [1]. Having regard to these complexities, it is clear that it would be prejudicial to the vital national interests of Guinea-Bissau in its exclusive economic zone and fishery zone to commit it to a decisional process clouded by so many obscurities and hampered by so many restraints.

It is to be noted finally that the exercise of fixing separate boundaries for separate zones through two or more discrete determinations is conceptually and methodologically different from the combined operation of evaluating them as a totality. The interplay of factors relevant to more than one boundary is immaterial to the former enquiry but central to the latter. The production of inconsistent boundary lines is possible under the first method but is unavailable under the second. Practical considerations of achieving a workable overall demarcation are of immediate importance to the second method but not necessarily to the first.

Needless to say, the compartmentalized enquiry can thus lead to vastly different results from the consolidated one. The result which is equitable in the context of any one or more boundaries viewed by themselves may well be inequitable in the context of a total determination.

It is not difficult to see why the agreement laid so much store by the concept of one demarcation line and why that factor assumes such central importance in this case.

In all these circumstances, one cannot conclude, unless compelled thereto by obligatory juristic principle, that an interpretation is legitimate which commits one party or the other to a situation so fraught with prejudice. Such a course neither offers a real solution to the problem before the Court nor ensures a fair determination for Guinea-Bissau of its exclusive

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[1] See "Delimitation of a Single Maritime Boundary: The Contribution of Equidistance to Geographical Equity in the Interrelated Domains of the Continental Shelf and the Exclusive Economic Zone", in *International Law at the Time of Its Codification, Essays in Honour of Roberto Ago*, 1987, Vol. II, p. 349.

> vaste majorité des cas normaux. La raison en est que les deux délimitations sont régies par des règles identiques. » (*C.I.J. Recueil 1982*, p. 115-116, par. 56.)

C'est ainsi également que M. Evensen, dans la même affaire, a relevé qu'il « serait manifestement opportun de tracer des lignes de délimitation identiques pour le plateau continental et pour la zone économique exclusive de 200 milles » (p. 319).

Il n'est pas nécessaire d'entrer ici dans toutes les complexités de ces processus, et il suffira simplement d'en relever l'existence aux fins limitées de la présente opinion. L'opinion dissidente de M. Gros dans l'affaire de la *Délimitation de la frontière maritime dans la région du golfe du Maine* et les écrits de M. Oda[1] mettent en lumière aussi l'étendue de ces complexités. Eu égard à ces complexités, il est clair qu'engager la Guinée-Bissau dans un processus de détermination assombri par tant d'obscurités et entravé par tant de contraintes porterait préjudice à ses intérêts nationaux vitaux dans sa zone économique exclusive et dans sa zone de pêche.

Il convient de noter enfin que l'opération consistant à fixer des frontières séparées pour des zones séparées au moyen de deux ou plusieurs déterminations distinctes est différente, sur les plans conceptuel et méthodologique, de l'opération globale consistant à les évaluer comme un tout. L'interaction de facteurs relatifs à plus d'une frontière est sans importance dans le premier cas mais revêt une importance capitale dans le second. L'établissement de lignes frontières incompatibles les unes avec les autres est possible selon la première formule, mais pas selon la deuxième. Sur le plan pratique, la nécessité de parvenir à une démarcation globale réaliste revêt une importance immédiate dans le cadre de la deuxième méthode, mais pas nécessairement dans celui de la première.

Il est à peine besoin de souligner qu'une analyse compartimentée peut ainsi conduire à des résultats extrêmement différents de ceux auxquels aboutit une analyse globale. Un résultat équitable dans le contexte d'une ou de plusieurs frontières considérées isolément peut fort bien être inéquitable dans le contexte d'une détermination globale.

Il n'est pas difficile de voir pourquoi le compromis faisait tant de cas du concept de ligne de démarcation unique et pourquoi ce facteur revêt une importance aussi cruciale en l'espèce.

Eu égard à toutes ces circonstances, l'on ne peut pas conclure, à moins d'être forcé à le faire par un principe de justice obligatoire, qu'une interprétation qui condamnerait l'une ou l'autre des Parties à une situation risquant de lui causer un tel préjudice est légitime. Une telle démarche n'offrirait pas de solution réelle au problème auquel la Cour est confron-

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[1] Voir « Delimitation of a Single Maritime Boundary : The Contribution of Equidistance to Geographical Equity in the Interrelated Domains of the Continental Shelf and the Exclusive Economic Zone », dans *International Law at the Time of Its Codification, Essays in Honour of Roberto Ago*, 1987, vol. II, p. 349.

economic zone and its fishery zone, which was among the principal purposes of the document under examination.

Without any intrusion into the question of the merits in relation to the Award concerning the territorial sea, the contiguous zone and the continental shelf, the conclusion seems irresistible that the failure of the Tribunal to address the entire question posed to it undermines the validity of even the partial answer it has rendered.

III. CONCLUSION

Reference was made at the commencement of this opinion to the importance of maintaining the integrity of international arbitration as one of the cardinal procedural achievements of international law. This involves the twin considerations of respecting the finality of arbitral awards once made and of holding arbitral proceedings within the confines of the *compromis* on which they are based. As international law matures it will be necessary, without impairing the integrity of the first principle, to develop the second so as to make it more responsive to the demands of juristic principle.

The case before us juxtaposes these competing considerations in a manner highlighting the importance of each. It would be tempting to adopt the stance that an unassailably valid *compromis* followed by a procedure enjoying all the appearances of regularity should be left intact and unimpaired. It is evident, however, that other considerations are involved, too important to the future of international arbitration to be ignored. A court invited to declare on the validity of the order, and with undoubted jurisdiction to make a pronouncement thereon, would, in my respectful view, be in error if it should fail to give to important vitiating factors the weight which they deserve.

It has been observed that the lack of courts with jurisdiction to examine questions of nullity and effectiveness is damaging to the development of international law in this field (see Jennings, *op. cit.*, p. 86). While "the enervating effect of the lack, or near lack, of courts with compulsory jurisdiction is nowhere more damaging than in this aspect of international law . . ." *(ibid.)*, we have here a situation where a court seised of the matter is eminently in a position to give some guidance on the substantive law relating to nullity. Deference to arbitral awards is important but deference in the presence of significant deviations from the *compromis* may damage the institution which it is intended to protect.

The reasons set out in this opinion lead to the conclusion that the burden of proof of invalidity, which at all times lay upon Guinea-Bissau, has been discharged and that the entire Arbitral Award is null and void. Guinea-Bissau is therefore entitled to a declaration to this effect.

tée, pas plus qu'elle n'assurerait une détermination équitable pour la Guinée-Bissau de sa zone économique exclusive et de sa zone de pêche, ce qui était l'un des objectifs principaux du document à l'étude.

Sans entrer de quelque façon que ce soit dans la question du fond de la sentence pour ce qui est de la mer territoriale, de la zone contiguë et du plateau continental, il paraît inévitable de conclure que le fait que le Tribunal n'a pas répondu à l'intégralité de la question qui lui était posée compromet la validité même de la réponse partielle qu'il a donnée.

III. Conclusion

J'ai évoqué au début l'importance de préserver l'intégrité de l'arbitrage international en tant qu'il représente l'une des réalisations procédurales majeures du droit international. Cela implique à la fois que l'on respecte le caractère définitif des sentences arbitrales qui ont été rendues et que l'on maintienne les procédures arbitrales dans les limites du compromis sur lesquelles elles se fondent. Au fur et à mesure que le droit international progresse, il sera nécessaire, sans porter atteinte à l'intégrité du premier principe, de développer le second afin qu'il réponde mieux aux exigences du principe de justice.

L'affaire dont nous sommes saisis juxtapose ces considérations contradictoires en faisant ressortir l'importance de chacune d'elles. Il serait tentant de considérer qu'un compromis incontestablement valide auquel a fait suite une procédure qui a toute l'apparence de la régularité doit demeurer intact et ne pas être altéré. Il est évident toutefois que d'autres considérations s'imposent, qui sont trop importantes pour l'avenir de l'arbitrage international pour pouvoir être ignorées. Une cour invitée à se prononcer sur la validité de la sentence, et indubitablement compétente pour le faire, serait à mon avis, avec tout le respect que je lui dois, dans l'erreur si elle ne donnait pas le poids qu'ils méritent à certains facteurs importants qui vicient la sentence.

On a fait observer que l'absence de tribunal compétent pour examiner les questions de nullité et de validité nuit au développement du droit international dans ce domaine (voir Jennings, *op. cit.*, p. 86). Si « l'effet débilitant de cette absence ou quasi-absence de tribunaux ayant compétence obligatoire n'est nulle part plus nuisible que dans ce domaine du droit international... » *(ibid.)*, en l'espèce une cour saisie de la question est éminemment capable de fournir certaines indications sur le fond du droit relatif à la nullité. La déférence due aux sentences arbitrales est importante mais elle risque, en présence de déviations notables par rapport au compromis, de nuire à l'institution qu'elle vise à protéger.

Les raisons exposées dans la présente opinion conduisent à conclure que la preuve de nullité de la sentence, dont la charge a toujours incombé à la Guinée-Bissau, a été rapportée et que la sentence arbitrale est nulle dans son ensemble. C'est donc à bon droit que la Guinée-Bissau a demandé une déclaration à cet effet.

The ground on which a declaration of nullity should issue is the ground that the Tribunal had no competence to decide that it would not decide a principal part of the matter entrusted to it and which, by its acceptance of its mandate, it had undertaken to decide. Its decision not to decide Question 2 was without jurisdiction. That decision was incompatible with the *compromis*, thus vitiating the Award from its very commencement. Moreover, the impossibility of obtaining a full and fair determination of the remaining portions of the boundary, so long as the portions of the boundary already determined remained valid, rendered it impossible to preserve even the determined portion of the boundary, thus undermining the answer to Question 1 as well, and resulting in the nullity of the total Award.

For the reasons set out in this opinion, the second declaration sought by Guinea-Bissau in its Memorial should be granted, but only on the ground that failure to reply to the second question did not comply with the provisions of the Arbitration Agreement, and not on the ground of failure to draw a single line and record that line on a map, or on the ground of failure to give reasons.

The third declaration sought by Guinea-Bissau, to the effect that the Government of Senegal is not justified in seeking to require the Government of Guinea-Bissau to apply the Award, should also be granted.

The first declaration sought by Guinea-Bissau, to the effect that the Award is inexistent, should be refused.

(Signed) Christopher Gregory WEERAMANTRY.

Le motif sur lequel devrait reposer une déclaration de nullité est que le Tribunal n'était pas compétent pour décider qu'il ne trancherait pas un élément majeur du différend qui lui avait été confié et sur lequel, en acceptant son mandat, il s'était engagé à statuer. Il n'était pas fondé à décider de ne pas répondre à la seconde question. Cette décision était incompatible avec le compromis et viciait par conséquent d'emblée la sentence. En outre, l'impossibilité d'obtenir la détermination complète et équitable des autres éléments de la frontière tant que ceux qui avaient déjà été déterminés demeuraient valables, écartait toute possibilité de maintenir ne serait-ce que les éléments déterminés de la frontière, ce qui compromettait aussi la validité de la réponse donnée à la première question et entraînait la nullité de la sentence dans son ensemble.

Pour les raisons exposées dans la présente opinion, la deuxième déclaration demandée par la Guinée-Bissau dans son mémoire aurait dû être admise, mais uniquement au motif que le fait de ne pas répondre à la seconde question n'était pas conforme aux dispositions du compromis d'arbitrage et non au motif qu'une ligne unique n'avait pas été tracée et portée sur une carte, ni pour défaut de motivation.

La troisième déclaration demandée par la Guinée-Bissau, à savoir que le Gouvernement du Sénégal n'est pas fondé à exiger que le Gouvernement de la Guinée-Bissau applique la sentence, aurait dû aussi être admise.

La première déclaration demandée par la Guinée-Bissau, selon laquelle la sentence serait inexistante, est à rejeter.

(Signé) Christopher Gregory WEERAMANTRY.

OPINION DISSIDENTE DE M. THIERRY

Je ne peux pas, à mon grand regret, m'associer à la décision de la Cour dans la présente affaire relative à la *Sentence arbitrale du 31 juillet 1989* et je donne ici les raisons de mon dissentiment qui porte essentiellement sur les conséquences juridiques du fait, explicitement reconnu par la Cour, que cette sentence « n'a pas abouti à une délimitation complète des espaces maritimes qui relèvent respectivement de la Guinée-Bissau et du Sénégal » (paragraphe 66 de l'arrêt de la Cour).

Le différend n'a donc pas été pleinement réglé et la Cour fait état des « éléments du différend non réglés par la sentence » (par. 68).

Le manquement serait toutefois imputable davantage aux Parties qu'au Tribunal dans la mesure où selon les termes de l'arrêt « ce résultat trouve son origine dans la rédaction retenue à l'article 2 du compromis » (par. 66).

Ainsi et en dépit de ce « résultat » la sentence est-elle déclarée valide et obligatoire pour les Parties, les conclusions de la Guinée-Bissau étant en conséquence rejetées.

Il m'apparaît au contraire :

1) que ce que la Cour désigne comme étant « les éléments du différend non réglés par la sentence » était la partie essentielle de celui-ci. Faute d'avoir réglé globalement le différend qui lui était soumis portant sur la détermination de la frontière maritime entre le Sénégal et la Guinée-Bissau le Tribunal a manqué à sa mission juridictionnelle. La preuve en est que cette frontière maritime n'est toujours pas déterminée. Le Tribunal n'a pas accompli sa tâche et c'est cette carence qui aurait dû, à mon avis, conduire la Cour à déclarer la sentence nulle ;

2) que ce manquement n'était pas justifié — contrairement à l'argumentation développée par la Cour — par les termes de l'article 2 du compromis. Cette disposition ne faisait pas obstacle au règlement global du différend pour autant qu'elle fut interprétée, dans son contexte et à la lumière du but et de l'objet du compromis, en faisant application des règles du droit international relatives à l'interprétation des traités qui procèdent de la jurisprudence de la Cour elle-même. Ainsi le différend pouvait-il — et devait-il donc — être réglé complètement et globalement conformément à la volonté commune des Parties, exprimée dans le compromis, et à la finalité essentielle de l'institution de l'arbitrage ;
3) que les paragraphes 66 et 67 de l'arrêt de la Cour doivent en revanche

DISSENTING OPINION OF JUDGE THIERRY

[Translation]

To my deep regret I am unable to associate myself with the Court's decision in the present case concerning the *Arbitral Award of 31 July 1989.* I hereby give the reasons for my dissent, which essentially relate to the legal consequences of the fact, explicitly recognized by the Court, that that Award: "has not brought about a complete delimitation of the maritime areas appertaining respectively to Guinea-Bissau and Senegal" (paragraph 66 of the Judgment of the Court).

It follows that the dispute has not been fully settled and the Court notes that there are "elements of the dispute that were not settled by the Arbitral Award" (para. 68).

The omission is nonetheless seen as ascribable to the Parties rather than to the Tribunal inasmuch as, according to the Judgment: "that result is due to the wording of Article 2 of the Arbitration Agreement" (para. 66).

Accordingly, and in spite of that "result", the Award is found to be valid and binding for the Parties and the submissions of Guinea-Bissau are consequently rejected.

It seems to me, on the contrary, that

(1) what the Court refers to as "elements of the dispute that were not settled by the . . . Award" were in fact the essential part of that dispute. Having failed to bring about a comprehensive settlement of the dispute submitted to it, relating to the determination of the maritime boundary between Senegal and Guinea-Bissau, the Tribunal failed to accomplish its jurisdictional mission — as can be seen from the fact that that maritime boundary has still not been delimited. The Tribunal did not do its job and it is that failure which should, in my opinion, have led the Court to find the Award to be null and void;

(2) contrary to the line of argument developed by the Court, that failure was not justified by the terms of Article 2 of the Arbitration Agreement. That provision did not stand in the way of a comprehensive settlement of the dispute provided it was interpreted in its context and in the light of the object and purpose of the Arbitration Agreement, in application of the rules of international law relating to the interpretation of treaties that have their origin in the jurisprudence of the Court itself. This means that the dispute could — and thus should — have been completely and comprehensively settled in accordance with the common will of the Parties, as expressed in the Arbitration Agreement, and with the essential purpose of the institution of arbitration;

(3) paragraphs 66 and 67 of the Court's Judgment should, on the other

être approuvés dans la mesure où ils ouvrent la voie au nécessaire règlement du différend, relatif à la détermination de leur frontière maritime, qui oppose de longue date le Sénégal et la Guinée-Bissau mais qui demeure encore jusqu'à présent privé de solution équitable.

I

Le Tribunal, constitué en vertu du compromis d'arbitrage du 12 mars 1985 conclu entre le Sénégal et la Guinée-Bissau, était officiellement dénommé, comme cela apparaît sur la première page de la sentence: «Tribunal arbitral pour la détermination de la frontière maritime, Guinée-Bissau/Sénégal» (en portugais: *Tribunal arbitral para a determinação da fronteira marítima, Guiné-Bissau/Senegal).* La mission de ce Tribunal était, comme il en va pour toutes les juridictions, de régler le différend qui lui était soumis. L'objet de ce différend découlait de la dénomination du Tribunal mais tout autant du préambule du compromis qui exprime l'intention et le but des Parties en vertu desquels cet accord a été conclu. Ce préambule porte que:

> «Le Gouvernement de la République du Sénégal et le Gouvernement de la République de Guinée-Bissau,
>
> Reconnaissant qu'ils n'ont pu résoudre par voie de négociation diplomatique le différend relatif à la détermination de leur frontière maritime,
>
> Désirant, étant donné leurs relations amicales, parvenir au règlement de ce différend dans les meilleurs délais, et à cet effet ayant décidé de recourir à un arbitrage,
>
> Sont convenus de ce qui suit...»

Ces termes sont parfaitement clairs. Le différend soumis au Tribunal par les deux Etats était le différend «relatif à la détermination de leur frontière maritime». (Le terme de «détermination» a son importance et n'a pas le même sens que celui de «délimitation», plus fréquemment employé dans l'arrêt de la Cour. La détermination s'applique à une ligne frontière que l'on ne connaît pas encore et qui reste à définir. La délimitation s'applique à des espaces connus, dont il s'agit de préciser l'étendue.)

Mais le compromis ne s'est pas borné à définir ainsi le différend, il formulait des directives quant aux modalités de son règlement par le Tribunal. S'agissant de la détermination de la frontière maritime celle-ci devait être assurée par la définition d'une «ligne frontière» et donc par une ligne unique. L'article 2, paragraphe 2, du compromis se réfère à cet égard à « *la ligne* délimitant les territoires maritimes qui relèvent respectivement de la République de Guinée-Bissau et de la République du Sénégal».

hand, be approved, as they open the way to the necessary settlement of the long-standing dispute between Senegal and Guinea-Bissau, for which there is still no equitable solution, relating to the determination of their maritime boundary.

I

The Tribunal, constituted under the Arbitration Agreement between Senegal and Guinea-Bissau dated 12 March 1985, was, as can be seen from the first page of the Award, officially entitled in French: *Tribunal arbitral pour la détermination de la frontière maritime, Guinée-Bissau/Sénégal* ["Arbitration Tribunal for the Determination of the Maritime Boundary: Guinea-Bissau/Senegal"] (and in Portuguese: *Tribunal arbitral para a determinação da fronteira marítima, Guiné-Bissau/Senegal*). The mission of that Tribunal, like every judicial body, was to settle the dispute submitted to it. The subject of that dispute followed from the name given to the Tribunal, but also from the Preamble to the Arbitration Agreement, which expressed the intention and the purpose of the Parties, by virtue of which that Agreement had been reached. That Preamble states that:

> "The Government of the Republic of Senegal and the Government of the Republic of Guinea-Bissau,
>
> Recognizing that they have been unable to settle by means of diplomatic negotiation the dispute relating to the determination of their maritime boundary,
>
> Desirous, in view of their friendly relations, to reach a settlement of that dispute as soon as possible and, to that end, having decided to resort to arbitration,
>
> Have agreed as follows . . ."

These terms are perfectly clear. The dispute submitted to the Tribunal by the two States was the dispute "relating to the determination of their maritime boundary". (The term "determination" is significant and does not mean the same thing as "delimitation", which occurs more frequently in the Judgment of the Court. The word "determination" applies to a boundary line that is not yet known and which remains to be defined. "Delimitation" applies to known areas, whose extent needs to be specified.)

However, the Arbitration Agreement did not merely define the dispute in that way; it also provided guidelines for the ways in which it was to be settled by the Tribunal. In relation to the determination of the maritime boundary, it was stated that this should be effected by the definition of a "boundary line", i.e., by a single line. Article 2, paragraph 2, of the Arbitration Agreement refers in that regard to: "*the line* delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively".

Est-il besoin de souligner que dans ce texte les « territoires maritimes » sont au pluriel et le mot « ligne » au singulier et qu'il s'agit donc d'une seule ligne et non pas de plusieurs ?

De même l'article 9, paragraphe 2, du compromis qui porte que la sentence : « doit comprendre le tracé de *la ligne frontière* sur une carte » est tout à fait explicite aussi bien quant à l'obligation que le mot « doit » implique que quant au concept de ligne frontière.

Ainsi n'y avait-il aucun doute quant à la mission du Tribunal telle qu'elle était définie par le compromis. Le Tribunal était appelé non pas à délimiter telle ou telle zone maritime relevant respectivement des Parties, mais à fournir une solution globale de leur différend par la détermination de leur frontière maritime.

C'est cette mission que le Tribunal n'a pas remplie. Comme on le sait le Tribunal s'est borné à juger que l'accord franco-portugais du 26 avril 1960, conclu antérieurement à l'indépendance des deux Etats en litige, « fait droit » dans les relations entre eux. Ce faisant le Tribunal a appliqué aux espaces maritimes le principe dit de l'*uti possidetis juris*, c'est-à-dire le principe du respect des frontières héritées de la colonisation. Le Tribunal a toutefois précisé que cet accord ne concernait que les seules zones qui existaient en droit international à l'époque de sa conclusion et qu'en conséquence seules ces zones avaient été délimitées, à savoir la mer territoriale, la zone contiguë et le plateau continental. La sentence suggère, en outre, de façon paradoxale dans ses motifs, qu'« on peut conclure que l'accord franco-portugais délimite le plateau continental entre les Parties dans toute l'étendue de la définition actuelle de cet espace maritime » (texte cité dans l'arrêt de la Cour au paragraphe 16).

Le caractère incertain de ces termes procède des mots « on peut conclure » et le paradoxe résulte de la référence à la définition *actuelle* du plateau continental, c'est-à-dire à sa définition au jour du prononcé de la sentence, alors que le Tribunal avait admis selon les « principes du droit intertemporel » que l'accord de 1960 devait être interprété à la lumière du droit en vigueur à l'époque de sa conclusion. On sait que la définition de l'étendue du plateau continental a beaucoup évolué entre 1960 et 1989 en raison du développement des moyens d'exploiter ses ressources et des travaux de la troisième conférence des Nations Unies sur le droit de la mer.

Mais s'étant ainsi prononcé sur l'applicabilité de l'accord de 1960, le Tribunal ne s'est pas prononcé sur la délimitation de la zone économique exclusive, non comprise dans cet accord, parce qu'elle n'a pris place dans le droit international que postérieurement à celui-ci, en fonction des travaux de la troisième conférence des Nations Unies sur le droit de la mer.

Pas davantage, le Tribunal n'a-t-il déterminé la frontière maritime unique délimitant l'ensemble des espaces maritimes, y compris la zone

Need one stress that, in this text, the "maritime territories" are in the plural and the word "line" is singular, and that it is therefore one single line, rather than several, that is contemplated?

In the same way, Article 9, paragraph 2, of the Arbitration Agreement, which provides that the Award "shall include the drawing of *the boundary line* on a map", is fully explicit both with respect to the obligation implied by the word "shall" and with respect to the concept of the boundary line.

There was therefore no uncertainty surrounding the mission of the Tribunal as defined by the Arbitration Agreement. It was required, not to delimit this or that maritime area appertaining to the Parties respectively, but to bring about a comprehensive settlement of their dispute by the determination of their maritime boundary.

This is the mission that the Tribunal has not accomplished. As we know, it confined itself to finding that the Franco-Portuguese Agreement of 26 April 1960, concluded prior to the independence of the two litigant States, "has the force of law" in the relations between them. By so doing, the Tribunal applied, to the maritime areas, the principle known as *uti possidetis juris* or, in other words, the principle of respect for frontiers inherited from the colonial period. The Tribunal nonetheless specified that that Agreement related exclusively to the only areas that existed in international law at the time of its conclusion and that, as a consequence, only those areas had been delimited, i.e., the territorial sea, the contiguous zone and the continental shelf. What is more the Award, in its statement of reasoning, makes the paradoxical suggestion that: "it may be concluded that the Franco-Portuguese Agreement delimits the continental shelf between the Parties over the whole extent of that maritime space as defined at present" (text quoted in paragraph 16 of the Judgment).

The vagueness of this statement derives from the words "it may be concluded" and the paradox results from the reference to the continental shelf as defined *at present*, i.e., to its definition on the day on which the Award was handed down, although the Tribunal had accepted, in accordance with the "principles of intertemporal law", that the Agreement of 1960 should be interpreted in the light of the law in force at the time of its conclusion. The definition of the extent of the continental shelf did of course evolve very markedly between 1960 and 1989, because of the development of the means whereby its resources could be exploited and as a result of the work done at the Third United Nations Conference on the Law of the Sea.

However, having made that finding on the applicability of the 1960 Award, the Tribunal did not pass on the delimitation of the exclusive economic zone, which was not covered by that Agreement, as that concept was not incorporated into international law until a later date, in relation to the work of the Third United Nations Conference on the Law of the Sea.

Nor did the Tribunal determine the single maritime boundary delimiting the whole of the maritime areas (including the exclusive economic

économique exclusive, relevant des deux Etats ni même esquissé le processus de cette détermination. Pas davantage enfin le Tribunal n'a-t-il compris dans sa décision une carte figurant le tracé de la frontière maritime, comme il en avait l'obligation en vertu de l'article 9, paragraphe 2, du compromis. De fait, cette omission était la conséquence du manquement du Tribunal à sa mission quant à la détermination de la ligne frontière. Faute que cette ligne ait été déterminée, il n'était évidemment pas possible de la faire figurer sur une carte comprise dans la décision du Tribunal ! Ainsi les manquements du Tribunal à ses obligations ont-ils revêtu un caractère cumulatif.

Du fait de ces manquements le Tribunal n'a pas rempli sa mission. La Cour a admis, à cet égard, comme je l'ai indiqué dès le début de cette opinion, que « la sentence n'a pas abouti à une délimitation complète des espaces maritimes qui relèvent respectivement de la Guinée-Bissau et du Sénégal ».

Il apparaît néanmoins que faute d'avoir réglé le différend complètement mais surtout globalement, le Tribunal ne l'a pas réglé du tout dès lors qu'il portait sur la détermination d'une frontière maritime, c'est-à-dire d'une *ligne* frontière unique. La délimitation de certaines zones maritimes, en vertu des dispositions de l'accord de 1960 et par référence à celles-ci, ne constitue pas un règlement partiel appelé à être complété par la délimitation d'autres zones et particulièrement de la zone économique, aboutissant, par touches successives, à une pluralité de lignes. Dès lors en effet que la délimitation des espaces maritimes relevant de chacun des deux Etats devait conduire à la détermination d'une frontière maritime unique, conformément à la volonté commune des Parties, il est clair que le tracé de cette frontière dépendait de la prise en considération de l'étendue de toutes les zones maritimes et non pas seulement de certaines d'entre elles. Ainsi, le Tribunal devait-il tenir compte de la délimitation de la zone économique autant que de celle des autres espaces afin de déterminer la frontière maritime.

Il n'est pas inutile de remarquer, à cet égard, que la volonté des Parties exprimée dans le compromis de bénéficier d'une frontière maritime unique correspond à l'évolution du droit et de la pratique en matière de délimitation. M. Weil a noté à ce sujet que l'arrêt rendu par une chambre de la Cour dans l'affaire de la *Délimitation de la frontière maritime dans la région du golfe du Maine* (arrêt du 12 octobre 1984) apporte

> « une contribution précieuse à l'évolution vers une frontière unique déterminée par l'application des mêmes critères « neutres » de la géographie côtière et le recours aux mêmes méthodes « neutres » de caractère géométrique » (*Perspectives du droit de la délimitation maritime*, Pedone, 1988, p. 135).

Dans la situation juridique actuelle résultant de la validation par la Cour de la sentence du 31 juillet 1989, les limites de certaines zones maritimes sont juridiquement établies en vertu de l'accord de 1960 et par référence à celui-ci mais la frontière maritime entre les deux Etats, à laquelle

zone) that appertained to the two States; it did not even sketch out the process of that determination. Nor did it include in its decision a map showing the course of the maritime boundary, as it was obliged to do by virtue of Article 9, paragraph 2, of the Arbitration Agreement. In fact, that omission was the consequence of the Tribunal's failure to accomplish its mission with respect to the determination of the maritime boundary. As that line had not been determined, it was clearly impossible to show it on a map included in the decision of the Tribunal! There was thus a cumulation of failures by the Tribunal to fulfil its obligations.

The result of these failures was that the Tribunal did not accomplish its mission. In that regard, the Court has accepted — as I said at the very beginning of this opinion — that "the Award has not brought about a complete delimitation of the maritime areas appertaining respectively to Guinea-Bissau and to Senegal".

It nonetheless appears that, because of its failure to settle the dispute in a complete and above all comprehensive manner, the Tribunal did not settle it at all, seeing that it related to the determination of a maritime boundary, i.e., a single boundary *line*. The delimitation of certain maritime areas by virtue of the provisions of the 1960 Agreement and by reference to that Agreement, does not constitute a partial settlement needing to be completed by the delimitation of other areas and, more particularly, by that of the economic zone — leading, by successive strokes, to a plurality of lines. Seeing that the delimitation of the maritime areas appertaining to each of the two States was to lead to the determination of a single maritime boundary, in accordance with the common will of the Parties, it is clear that the course of that boundary depended upon the taking into consideration of the extent of all the maritime areas, not just some of them. The Tribunal had therefore to take account of the delimitation of the economic zone, to the same extent as that of the other areas, in order to determine the maritime boundary.

It is as well to point out, in that regard, that the Parties' desire for a single maritime boundary, as expressed in the Arbitration Agreement, corresponds to the development of the law and the practice in relation to delimitation. Professor Weil has pointed out that the Judgment of a Chamber of the Court in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case (Judgment of 12 October 1984) made

> "a significant contribution to the trend towards a single boundary, determined by the application of the same 'neutral' criteria of coastal geography and recourse to the same 'neutral' geometric methods" (*Perspectives du droit de la délimitation maritime*, Pedone, 1988, p. 135).

In the current legal situation resulting from the Court's validation of the Award of 31 July 1989, the boundaries of certain maritime areas are legally established by virtue of the 1960 Agreement and with reference to it, but the maritime boundary between the two States, as referred to in the

le compromis de 1985 se réfère, demeure indéterminée. Cette incertitude est naturellement préjudiciable aux bonnes relations de voisinage entre les deux Etats.

C'est dire que les «éléments non réglés du différend», dont la Cour a fait état, sont l'essentiel, son objet véritable. Le règlement incomplet du différend équivaut à l'absence de règlement. Le proverbe dit vrai que faire les choses à moitié n'est pas les faire du tout.

C'est cette absence, et par là même le manquement du Tribunal à sa mission juridictionnelle, qui aurait dû conduire la Cour à déclarer la sentence nulle. Ce faisant la Cour n'aurait, en aucune façon, agi comme une cour d'appel à l'égard du Tribunal. Elle n'aurait pas réformé la sentence. Elle n'aurait pas outrepassé sa compétence en la matière telle qu'elle a été précisée dans son arrêt dans l'affaire de la *Sentence arbitrale rendue par le roi d'Espagne le 23 décembre 1906*, dont le passage pertinent est cité au paragraphe 25 de la décision de la Cour dans la présente affaire. La Cour aurait en revanche constaté la défaillance du Tribunal; cette défaillance étant constitutive de «l'excès de pouvoir» bien que cette expression, généralement employée pour désigner les cas où une juridiction va au-delà de sa compétence et statue ainsi *ultra petita*, soit, en l'occurrence, peu adéquate. Il est toutefois généralement admis que l'excès de pouvoir peut résulter aussi bien du dépassement par un tribunal de sa mission que du manquement à celle-ci. Mais quoi qu'il en soit de ces considérations terminologiques, une sentence qui n'assure pas le règlement du litige doit être considérée comme nulle en vertu d'une jurisprudence bien établie dont l'arrêt de la Cour ne s'écarte pas.

En disant en effet qu'elle doit

> «seulement rechercher si le Tribunal, en rendant la sentence contestée, a manifestement méconnu la compétence qui lui avait été donnée par le compromis, en outrepassant sa compétence ou en ne l'exerçant pas» (par. 47),

la Cour admet qu'une sentence incompatible avec le compromis doit être annulée. En l'occurrence toutefois, la Cour a jugé que la sentence était compatible avec le compromis alors que, selon mon opinion fondée sur les raisons ci-dessus exprimées, elle est incompatible avec celui-ci.

La Cour a-t-elle eu le souci de préserver l'institution de l'arbitrage international, en validant la sentence du 31 juillet 1989 bien que celle-ci laisse pour l'essentiel le différend sans solution? Le souci de ne pas inciter les Etats à contester abusivement les sentences est certes légitime et l'on conçoit que la Cour en soit préoccupée. Mais on peut redouter également que l'institution si importante et respectable de l'arbitrage ne souffre d'une jurisprudence trop exclusivement inspirée par ce souci, aboutissant à la confirmation de sentences gravement défectueuses. S'il apparaissait en effet que la présomption de validité des sentences, qui est en soi légi-

1985 Arbitration Agreement, remains undetermined. That uncertainty is naturally detrimental to good neighbourly relations between the two States.

In other words, the "elements of the dispute that were not settled" which feature in the Judgment of the Court are the essence of the dispute, its true subject. The incomplete settlement of the dispute is tantamount to an absence of a settlement. It is a proverbial truth that doing things by halves is the same as not doing them at all.

It is that omission and the corresponding failure of the Tribunal to accomplish its judicial mission, that should have led the Court to find that the Award was null and void. By so doing, the Court would not in any way have acted as a court of appeal in relation to the Tribunal, and would not have subjected the Award to a *réformation.* It would not have exceeded its jurisdiction as explained in its Judgment in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906*, of which the relevant passage is quoted in paragraph 25 of the Court's decision in the present case. It would, on the contrary, have pointed to the derelictions of the Tribunal, as those derelictions together constituted the *"excès de pouvoir"* even though that expression, generally employed to designate cases in which a court exceeds its jurisdiction and, by so doing, decides *ultra petita*, is rather inappropriate in the context of this case. It is nonetheless generally accepted that an *excès de pouvoir* may result both from a situation in which a judicial body exceeds its mission and from any failure to accomplish that mission. However, those terminological considerations apart, an award which does not achieve the settlement of the dispute should be found to be null and void, by virtue of a well-established jurisprudence from which the Judgment of the Court does not depart.

For by saying that

> "It has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction" (para. 47),

the Court admits that an award incompatible with the agreement for the arbitration should be annulled. However, in the present case, the Court has found that the Award was compatible with the Arbitration Agreement although in my opinion, based upon the reasons I have given, it is incompatible with it.

Was the Court concerned to preserve the institution of international arbitration by validating the Award of 31 July 1989, even though that Award leaves the dispute essentially unsettled? Not to encourage States to contest awards for no good reason is, of course, a legitimate concern, and it is understandable that the Court should be affected by it. However, one may also fear that such an important and respectable institution as arbitration may suffer from a jurisprudence too exclusively inspired by that concern, leading to the confirmation of awards that are seriously flawed. If the presumption of validity of awards, which is in itself legitimate, were

time, revêtait, en fait, en raison de la ligne de conduite suivie par la Cour, le caractère d'une présomption irréfragable, les Etats, et particulièrement ceux qui n'ont qu'une faible expérience des procédures internationales, seraient, en l'absence de tout recours utile, de toute garantie contre l'excès de pouvoir ou la carence des juridictions arbitrales, découragés de porter les différends devant ces juridictions.

La Cour manifeste dans la présente affaire une inclination très sensible dans le sens d'une présomption très forte, très absolue quant à la validité des sentences. C'est ce qui résulte de ce qui a été exposé ci-dessus mais aussi de son raisonnement quant à l'interprétation de l'article 2 du compromis, par lequel le manquement du Tribunal à sa mission a été jugé néanmoins compatible avec les termes du compromis.

II

Peut-on admettre, en suivant le raisonnement de la Cour, que la démarche du Tribunal, et donc le caractère incomplet de la sentence, était justifiée par les termes de l'article 2 du compromis ?

C'est autour de cette disposition que les débats devant la Cour ont été principalement ordonnés et c'est essentiellement sur cette disposition que la Cour s'est appuyée afin de conclure que la sentence est compatible avec le compromis. A mon avis, au contraire, l'article 2 ne faisait pas obstacle à l'accomplissement par le Tribunal de la mission qui était sa raison d'être et pour laquelle il avait été établi, et donc de l'obligation prioritaire, primordiale, de mener à bien sa tâche quant à la détermination de la frontière maritime entre les deux Etats.

Le texte de cet article 2, qui formule les questions sur lesquelles le Tribunal était appelé à statuer en vue du règlement du différend, est le suivant :

> « Il est demandé au Tribunal de statuer conformément aux normes du droit international sur les questions suivantes :
>
> 1. L'accord conclu par un échange de lettres, le 26 avril 1960, et relatif à la frontière en mer, fait-il droit dans les relations entre la République de Guinée-Bissau et la République du Sénégal ?
>
> 2. En cas de réponse négative à la première question, quel est le tracé de la ligne délimitant les territoires maritimes qui relèvent respectivement de la République de Guinée-Bissau et de la République du Sénégal ? »

L'histoire des négociations dont cette disposition est issue a été rappelée par la Cour à l'appui de son opinion, selon laquelle le Tribunal n'avait pas pour tâche, en tout état de cause, de délimiter l'ensemble des espaces maritimes relevant respectivement des deux Etats par une ligne unique. J'ai exposé ci-dessus les raisons, tirées des dispositions du compromis,

ever to assume the character of an irrefutable presumption because of the line of conduct followed by the Court, States — and in particular those with no more than a limited experience of international procedures — would, in the absence of any appropriate recourse or safeguard against *excès de pouvoir* or deficiencies of arbitration tribunals, be discouraged from referring their disputes to those tribunals.

In the present case, the Court displays a very perceptible inclination towards a very strong and very absolute presumption of validity of awards. This can be seen from what I have just said, and is also apparent from its reasoning on the interpretation of Article 2 of the Arbitration Agreement, whereby the Tribunal's failure to accomplish its mission was nonetheless found to be compatible with the terms of that Agreement.

II

Is it a tenable view, on the lines of the Court's reasoning, that the Tribunal's approach, and accordingly the incomplete nature of the Award, was justified by the terms of Article 2 of the Arbitration Agreement?

Argument before the Court centred on this provision and it was fundamentally on it that the Court based its conclusion that the Award is consistent with that Agreement. It is, on the contrary, my opinion that Article 2 did not prevent the Tribunal from accomplishing the mission which was its *raison d'être* and the purpose of its establishment, and, therefore, from fulfilling the Tribunal's primary, primordial obligation to perform its task with respect to the determination of the maritime boundary between the two States.

The text of this Article 2, which sets out the questions the Tribunal was to decide with a view to a settlement of the dispute, is as follows:

> "The Tribunal is requested to decide in accordance with the norms of international law on the following questions:
>
> 1. Does the Agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?
>
> 2. In the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively?"

The history of the negotiations that led to this provision has been outlined by the Court in support of its opinion that it was not the Tribunal's task in any event to delimit the whole of the two States' maritime areas by a single line. I have set out above the reasons, based on the provisions of the Arbitration Agreement, for which I feel that this view is not well founded;

pour lesquelles cette opinion ne me paraît pas fondée, mais l'historique des négociations tel qu'il a été mis en valeur par la Cour est en revanche éclairant quant à la rédaction de l'article 2 et particulièrement à l'articulation des deux paragraphes qu'il comporte.

Comme la Cour l'a rappelé (arrêt, par. 53 et suiv.) le Sénégal, au cours de la négociation du compromis, mettait l'accent sur l'accord franco-portugais de 1960 dont il tirait avantage et souhaitait que la ligne déterminée par cet accord (ligne droite de 240°) soit pérennisée et serve donc de délimitation unique pour tous les espaces maritimes présents et futurs sur lesquels les deux Etats seraient respectivement appelés à exercer des droits exclusifs. Le Sénégal s'attendait donc à ce que la reconnaissance de la validité de l'accord de 1960 suffise à régler le différend complètement de telle façon que la frontière maritime unique soit la ligne des 240°. La Guinée-Bissau, au contraire, qui se considérait comme étant désavantagée par l'accord de 1960 (et qui l'est effectivement comme cela apparaît à l'évidence pour peu que l'on regarde la carte figurant la ligne des 240°, qui n'a pas été produite par le Tribunal), souhaitait qu'il soit procédé à une délimitation *ex novo* compte tenu de l'évolution du droit de la mer, particulièrement quant au plateau continental et à la zone économique exclusive. Mais les deux Parties étaient ainsi en accord quant à l'exigence d'une ligne unique, bien que ce ne fût pas la même qui était souhaitée par l'une et par l'autre.

Aussi, la rédaction de l'accord d'arbitrage a-t-elle été, comme c'est souvent le cas, le fruit d'un compromis (au sens, ici, de solution moyenne acceptée au prix de concessions mutuelles). L'article 2 a comporté deux questions, l'une correspondant aux vœux du Sénégal sur l'applicabilité de l'accord de 1960 et la seconde à ceux de la Guinée-Bissau demandant que soit tracée *ex novo* une ligne frontière. Une relation de subordination de la seconde question à la première fut toutefois acceptée et manifestée par les termes : « En cas de réponse négative à la première question », par lesquels le libellé de la seconde question débute. Mais les deux Parties considéraient qu'en tout état de cause le différend serait pleinement réglé quelle que fût la réponse donnée par le Tribunal à la première question (soit qu'une réponse positive à celle-ci assure le règlement complet du différend, soit qu'une réponse négative permette d'aborder la seconde question). Au surplus, les deux Parties, le Sénégal autant que la Guinée-Bissau, se sont constamment référées, au cours de la procédure devant le Tribunal, à une ligne unique et donc, au règlement global du différend, comme cela apparaît au demeurant dans les conclusions finales du Sénégal au terme de cette procédure (annexes au mémoire de la Guinée-Bissau, livre IV, deuxième partie, audience du 29 mars 1988, après-midi, p. 281).

Mais la volonté commune des Parties ne pouvait pas être respectée par la seule réponse à la première question, dès lors que le Tribunal, tenu par le principe du droit intertemporel, a estimé que l'accord de 1960 s'appliquait à certaines zones (mer territoriale, zone contiguë, plateau continental) mais pas à d'autres et particulièrement pas à la zone économique.

but the history of the negotiations, as outlined by the Court, sheds light on the language of Article 2 and, particularly, the way its two paragraphs mesh.

As the Court has pointed out (paras. 53 *et seq.* of the Judgment), in the course of the negotiation of the Arbitration Agreement, Senegal laid particular emphasis on the Franco-Portuguese Agreement of 1960, which was advantageous to it, and wanted the line laid down by this Agreement (a straight line at 240°) to be perpetuated so that it would constitute the sole delimitation for all the maritime areas, present and future, over which the two States would respectively be called upon to exercise exclusive rights. Senegal therefore expected that recognition of the validity of the 1960 Agreement would suffice for the complete settlement of the dispute in such a way that the single maritime boundary would be the 240° line. On the other hand Guinea-Bissau, which considered itself disadvantaged by the 1960 Agreement (which is indeed the case, as is abundantly clear from the most cursory inspection of the map — not produced by the Tribunal — showing the 240° line) wanted an *ex novo* delimitation taking account of the evolution of the law of the sea, particularly as regards the continental shelf and the exclusive economic zone. However, both Parties were agreed as to the need for a single line, although it was not the same line they had in mind.

Thus, the language of the Arbitration Agreement was, as is often the case, the result of a compromise (i.e., an intermediate solution accepted at the price of mutual concessions). Article 2 set forth two questions, one reflecting the wishes of Senegal as to the applicability of the 1960 Agreement and a second one reflecting those of Guinea-Bissau, which strove for an *ex novo* delimitation of the boundary line. That the second question was to be subordinated to the first was nevertheless accepted and made clear by the phrase "In the event of a negative answer to the first question", at the beginning of the second question. But both Parties considered that in any event the dispute would be completely settled whatever the reply of the Tribunal to the first question (whether an affirmative reply to it effected a complete settlement of the dispute, or a negative one enabled the Tribunal to deal with the second question). Moreover, both Parties, Senegal as well as Guinea-Bissau, referred, throughout the proceedings before the Tribunal, to a single line and therefore to a global settlement of the dispute, as can be seen from the final submissions of Senegal formulated at the close of those proceedings. (Annexes to the Memorial of Guinea-Bissau, Book IV, Part 2, Hearing of 29 March 1988 (afternoon), p. 281.)

But it was not possible to meet the common desire of the Parties by answering only the first question once the Tribunal, being bound by the principle of intertemporal law, had held that the 1960 Agreement applied to certain areas (territorial sea, contiguous zone and continental shelf) but not to others and particularly not to the economic zone. Thus the principle

Ainsi le principe du droit intertemporel interdisait-il qu'une réponse positive à la première question formulée par l'article 2 du compromis suffise à assurer le règlement du différend.

Le Tribunal a donc été placé devant le choix suivant. Ou bien il s'en tenait à une interprétation littérale de l'article 2 qui le conduisait à ne pas répondre à la seconde question et donc à ne pas déterminer la ligne frontière et à ne pas régler le différend en renonçant ainsi à la mission qui lui était impartie par le compromis. Ou bien, au contraire, le Tribunal s'attachait à interpréter l'article 2 à la lumière des buts et de l'objet du compromis et, répondant à la seconde question, menait à bien sa mission juridictionnelle en déterminant conformément à celle-ci la frontière maritime entre les deux Etats.

C'est la première de ces deux solutions qui a été adoptée par le Tribunal sans qu'il ait pris soin de la justifier autrement que de façon implicite et sans énoncer ce choix dans le dispositif de la sentence. La décision du Tribunal à ce sujet figure seulement dans les motifs de la sentence et est motivée en quatre lignes (paragraphe 87 de la sentence cité au paragraphe 17 de l'arrêt de la Cour). Ce sont ces malfaçons, imputables sans doute au caractère chaotique de la procédure étalée sur quatre années (1985-1989) et aux divergences de vues très accusées au sein du Tribunal (révélées par la déclaration de son président et par l'opinion dissidente de M. Bedjaoui), qui ont fait dire à la Cour que : « la sentence est de ce point de vue construite d'une manière qui pourrait donner prise à la critique » (par. 41) ou encore que « la motivation ainsi retenue est brève et aurait pu être plus développée » mais que « bien que ramassée » elle est « claire et précise » (par. 43). Ces expressions ont été, à n'en pas douter, choisies avec soin mais l'arrêt de la Cour apparaît ainsi, à bien des égards, comme une anthologie de l'euphémisme : éléments du différend non réglés ; sentence construite d'une manière qui pourrait donner prise à la critique ; motivation, bien que ramassée... !

Mais le raisonnement de la Cour afin de parvenir à la validation de la sentence est heureusement plus élaboré que celui du Tribunal. La Cour a estimé qu'en raison des termes de l'article 2 le Tribunal n'avait pas pour tâche, en tout état de cause, de délimiter l'ensemble des espaces maritimes relevant des deux Etats par une ligne unique. Les Parties auraient seulement « exprimé de manière générale, dans le préambule du compromis, leur désir de parvenir à un règlement de leur différend », mais n'y auraient « consenti que dans les termes prévus à l'article 2 » (par. 56).

Ainsi cette disposition — l'article 2 — eût-elle été la seule par laquelle la volonté des Parties se serait manifestée, le préambule étant de l'ordre du désir et l'article 9 étant subordonné à l'article 2.

En conséquence, le règlement global du différend n'étant pas, selon la Cour, la tâche prioritaire du Tribunal, l'interprétation littérale du paragraphe 2 du compromis ne se heurtait à aucun obstacle et était la plus conforme aux règles de l'interprétation des traités. En répondant positivement à la première question et en décidant, fût-ce de façon implicite, de ne pas répondre à la seconde, le Tribunal n'aurait, selon la Cour, commis

of intertemporal law prevented an affirmative answer to the first question of Article 2 of the Arbitration Agreement from being sufficient for the settlement of the dispute.

The Tribunal was therefore faced with the following alternatives: either it would not go beyond a literal interpretation of Article 2, and thus refrain from answering the second question and hence from determining the frontier line, thereby failing to settle the dispute and leaving unperformed the mission entrusted to it by the Arbitration Agreement; or, on the contrary, the Tribunal might seek to interpret Article 2 in the light of the object and purposes of the Arbitration Agreement and, by answering the second question, perform its jurisdictional mission by determining, in keeping with that mission, the maritime boundary between the two States.

It was the former of the two solutions that the Tribunal adopted, without taking steps to justify its decision, except implicitly, and without stating its choice in the operative part of the Award. The decision taken by the Tribunal in this connection appears only in the statement of reasoning, and the Tribunal's grounds are set out in four lines (paragraph 87 of the Award, quoted in paragraph 17 of the Court's Judgment). It was these defects, due no doubt to the chaotic character of proceedings that lasted four years (1985-1989) and to the very pronounced disagreements that arose within the Tribunal (and were revealed by the declaration of its President and the dissenting opinion of Mr. Bedjaoui), which prompted the Court to state that "the structure of the Award is, in that respect, open to criticism" (para. 41) and that "this reasoning is brief, and could doubtless have been developed further", but that the statement of reasoning, while succinct, "is clear and precise" (para. 43). These expressions were no doubt carefully chosen, but the Court's Judgment appears to be, in a number of respects, a collection of euphemisms: elements of the dispute that were not settled; award so structured as to be open to criticism; reasoning that was brief but . . .!

However, the reasoning that led the Court to declare the Award valid is, fortunately, more fully worked out than that of the Tribunal. The Court held that, given the language of Article 2, it was not the Tribunal's task to delimit the whole of the maritime spaces appertaining to the two States, by a single line, in any event. The Parties had only "expressed in general terms in the Preamble of the Arbitration Agreement their desire to reach a settlement of their dispute" but "their consent thereto had only been given in the terms laid down by Article 2" (para. 56).

That provision — Article 2 — was accordingly the only one in which the will of the Parties had been manifested, since the Preamble was merely optative and Article 9 was subordinated to Article 2.

As a result, since the comprehensive settlement of the dispute was not seen by the Court as the primary task of the Tribunal, there was nothing to stand in the way of a literal interpretation of paragraph 2 of the Arbitration Agreement and that interpretation was the one most consistent with the rules of interpretation of treaties. By answering the first question in the affirmative and deciding, though implicitly, not to answer the second, the

aucune omission de statuer. En outre la production de la carte exigée par l'article 9 du compromis eût été inutile en conséquence du choix de ne pas répondre à la seconde question et cette omission, en tout état de cause, « ne saurait constituer dans les circonstances de l'espèce une irrégularité de nature à entacher la sentence arbitrale d'invalidité » (par. 64).

Ainsi les conclusions de la Cour reposent-elles essentiellement sur la prémisse selon laquelle le Tribunal n'était pas nécessairement tenu de déterminer la ligne frontière.

Le raisonnement de la Cour peut être analysé comme un syllogisme correspondant au schéma suivant :

1) le Tribunal n'était pas tenu en tout état de cause de régler le différend complètement ;
2) le Tribunal a réglé le différend partiellement ;
3) donc la sentence est valide.

C'est la prémisse de ce syllogisme que j'ai, ci-dessus, contestée en montrant qu'il résultait, au contraire, clairement du compromis (de son préambule, de l'article 2, du paragraphe 2 de l'article 9), et aussi bien de l'histoire des négociations de cet instrument telle qu'elle a été rapportée par la Cour ou encore des conclusions des Parties lors de la procédure devant le Tribunal, que la volonté commune des Parties était de parvenir à la détermination d'une frontière maritime unique et que telle était la mission essentielle confiée au Tribunal.

Or si, comme je le pense, la prémisse du raisonnement de la Cour est inexacte, la conclusion l'est également par voie de conséquence.

Mais pour que le raisonnement de la Cour soit pleinement réfuté, il faut encore montrer que le Tribunal pouvait répondre à la seconde question sans commettre un « excès de pouvoir », cette fois au sens le plus habituel de cette expression, c'est-à-dire en n'allant pas au-delà de sa compétence aux termes du compromis.

La Cour a rappelé deux règles fondamentales de l'interprétation des traités, applicables à l'interprétation du compromis : la première dite « règle du sens ordinaire des mots » a été formulée par exemple dans l'affaire de la *Compétence de l'Assemblée générale pour l'admission d'un Etat aux Nations Unies* dans les termes suivants cités par la Cour :

> « le premier devoir d'un tribunal, appelé à interpréter et à appliquer les dispositions d'un traité, est de s'efforcer de donner effet, selon leur sens naturel et ordinaire, à ces dispositions prises dans leur contexte. Si les mots pertinents, lorsqu'on leur attribue leur signification naturelle et ordinaire, ont un sens dans leur contexte, l'examen doit s'arrêter là. » (*Avis consultatif, C.I.J. Recueil 1950*, p. 8, cité au paragraphe 48 du présent arrêt.)

La seconde est celle qui exige qu'il soit tenu compte de l'objet et du but

Tribunal had, in the opinion of the Court, in no way failed to exercise jurisdiction. Moreover, there would have been no need to produce the map required by Article 9 of the Arbitration Agreement, given the Tribunal's decision not to answer the second question and, in any event, that omission could not "constitute such an irregularity as would render the Award invalid" (para. 64).

Thus the Court's conclusions rest essentially on the premise that the Tribunal was not necessarily required to determine the boundary line.

The reasoning of the Court can be analysed as a syllogism having the following form:

(1) the Tribunal was not under an obligation to settle the dispute completely in any event;
(2) the Tribunal settled the dispute in part;
(3) the Award is therefore valid.

I have, earlier in this opinion, challenged the premise of this syllogism, showing that, on the contrary, it was clear from the Arbitration Agreement (from its Preamble, from Article 2, from Article 9, paragraph 2), and also from the history of the negotiations that led to the conclusion of this instrument, as outlined by the Court, as well as from the submissions of the Parties in the proceedings before the Tribunal, that the common desire of the Parties was to bring about the delimitation of a single maritime boundary and that such was the essential task they entrusted to the Tribunal.

Now if, as I believe is the case, the premise of the Court's reasoning is incorrect, it necessarily follows that the conclusion is also incorrect.

But in order to refute the reasoning of the Court fully, it is also necessary to show that the Tribunal could answer the second question without committing an *excès de pouvoir* — in the more usual meaning of the term, i.e., without exceeding its competence under the Arbitration Agreement.

The Court has recalled two fundamental rules of interpretation of treaties, applicable to the interpretation of the Arbitration Agreement; the first, known as that "of the ordinary meaning of terms", was formulated, for example, in the Court's opinion in the case concerning the *Competence of the General Assembly for the Admission of a State to the United Nations*, in which the Court made the following observations:

> "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter." (*Advisory Opinion, I.C.J. Reports 1950*, p. 8, quoted in paragraph 48 of the present Judgment.)

The second rule is the one requiring the object and the purpose of the

du traité. Souvent mise en œuvre par la Cour permanente de Justice internationale (*Service postal polonais à Dantzig, 1925, C.P.J.I. série B nº 11*, p. 39; *Interprétation de la convention de 1919 concernant le travail de nuit des femmes, 1932, C.P.J.I. série A/B nº 50*, p. 373), elle est énoncée, dans les termes suivants:

> « Lorsque cette méthode d'interprétation [celle de l'interprétation selon le sens ordinaire des mots] aboutit à un résultat incompatible avec l'esprit, l'objet et le contexte de la clause ou de l'acte où les termes figurent, on ne saurait valablement ... accorder crédit [à cette méthode]. » (*Sud-Ouest africain, exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 336.)

Cela implique que lorsque le résultat est incompatible avec l'objet de l'accord (en l'occurrence le compromis) il y a lieu de tenir compte de cet objet pour l'interpréter.

L'article 31 de la convention de Vienne sur le droit des traités, dont la Cour dit qu'il peut être considéré comme une codification du droit coutumier existant, porte à ce sujet que:

> « Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité *dans leur contexte et à la lumière de son objet et de son but.* »

Si, selon l'affirmation de la Cour, le Tribunal n'était pas tenu de régler globalement et complètement le différend qui lui était soumis, on conçoit que l'interprétation littérale de l'article 2 eût été appropriée, bien qu'il eût été aussi nécessaire de tenir compte du contexte, c'est-à-dire de la définition du différend dans le préambule et de l'article 9 du compromis.

Si au contraire, comme je le pense, le Tribunal était tenu de régler le différend par la détermination d'une ligne frontière, il est clair que la méthode du sens ordinaire aboutissait à un résultat incompatible avec l'esprit et l'objet du compromis et avec le contexte de l'article 2, l'absence de réponse à la seconde question faisant en sorte que le différend ne soit pas réglé.

C'est dire qu'il appartenait au Tribunal de tenir compte, conformément à la jurisprudence de la Cour permanente de Justice internationale et de la Cour en matière d'interprétation des traités, de l'esprit du compromis et surtout de son objet qui était d'assurer le règlement du différend par la détermination d'une ligne frontière. Cela aurait conduit le Tribunal à considérer que les termes de l'article 2 ne s'opposaient à ce qu'une réponse à la seconde question soit donnée que si la réponse à la première permettait de régler le différend. Cela n'étant pas le cas il lui appartenait de répondre à la seconde question dans toute la mesure où la réponse à la première laissait le différend sans véritable solution. Aucun excès de pouvoir n'aurait été commis dès lors que cette interprétation de l'article 2 eût été non pas seulement compatible avec les dispositions du compromis mais exigée par la considération de son objet. Ainsi, doit-on conclure que

treaty to be taken into account. This rule, often applied by the Permanent Court of International Justice (*Polish Postal Service in Danzig, 1925, P.C.I.J., Series B, No. 11*, p. 39; *Interpretation of the Convention of 1919 concerning Employment of Women during the Night, 1932, P.C.I.J., Series A/B, No. 50*, p. 373), has been formulated in the following terms:

> "Where such a method of interpretation [the one based on the ordinary meaning of terms] results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it." (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 336.)

This implies that whenever the result is incompatible with the object of the agreement (in the present case the Arbitration Agreement) that object should be taken into account for purposes of interpretation.

Article 31 of the Vienna Convention on the Law of Treaties, which, as the Court has observed, can be regarded as a codification of existing customary law, provides in this respect that:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose.*"

If, as the Court states, the Tribunal was not bound to arrive at a comprehensive and complete settlement of the dispute submitted to it, it is conceivable that a literal interpretation of Article 2 would have been appropriate, although it would also have been necessary to take account of the context, that is, of the definition of the dispute in the Preamble and Article 9.

If, on the other hand, as I maintain, the Tribunal was bound to settle the dispute by determining a boundary line, it is clear that the "ordinary meaning" method led to a result incompatible with the spirit and the object of the Arbitration Agreement, as well as with the context of Article 2, since failure to reply to the second question resulted in the dispute not being settled.

In other words, it was for the Tribunal to take into account, in accordance with the jurisprudence of the Permanent Court of International Justice and of this Court with regard to the interpretation of treaties, the spirit of the Arbitration Agreement and above all its object, which was to ensure the settlement of the dispute by the determination of a boundary line. The Tribunal would thus have concluded that the terms of Article 2 only prevented the second question from being answered if the answer to the first one allowed the dispute to be settled. As this was not the case, the Tribunal was to answer the second question to the full extent that its answer to the first one left the dispute virtually unresolved. No *excès de pouvoir* would have been committed since this interpretation of Article 2 would have been not only consistent with the provisions of the Arbitration Agreement but required in the light of its object. Accordingly, in conclusion, the

la Cour se devait de constater que le Tribunal n'avait pas accompli sa tâche alors qu'aucun obstacle juridique ne s'y opposait et de tirer les conséquences de cette carence.

III

Dans les paragraphes 66 à 68 de son arrêt, la Cour, après avoir constaté que la sentence « n'a pas abouti à une délimitation complète des espaces maritimes qui relèvent respectivement de la Guinée-Bissau et du Sénégal », a pris note du fait que la Guinée-Bissau a déposé au Greffe de la Cour une seconde requête demandant à la Cour de dire « quel doit être ... le tracé (figuré sur une carte) délimitant l'ensemble des territoires maritimes relevant respectivement de la Guinée-Bissau et du Sénégal ». Elle a également pris note de la déclaration de l'agent du Sénégal selon laquelle une

> « solution serait de négocier avec le Sénégal, qui ne s'y oppose pas, une frontière de la zone économique exclusive ou, si un accord n'est pas possible, de porter l'affaire devant la Cour ».

La Cour enfin estime :

> « qu'il serait éminemment souhaitable que les éléments du différend non réglés par la sentence arbitrale du 31 juillet 1989 puissent l'être dans les meilleurs délais, ainsi que les deux Parties en ont exprimé le désir » (arrêt, par. 68).

Cette considération correspond à l'intérêt des deux pays et il y a lieu de s'y associer. Mais il faut aussi s'entendre sur le sens des termes « les éléments du différend non réglés par la sentence arbitrale du 31 juillet 1989 ». Selon l'opinion ci-dessus exprimée, ces éléments non réglés du différend forment sa partie essentielle, qui est la détermination de la frontière maritime entre les deux Etats, délimitant l'ensemble des territoires maritimes relevant respectivement de chacun d'entre eux, appelée à être déterminée équitablement selon les principes et les normes du droit international acceptés par le Sénégal et la Guinée-Bissau.

(Signé) Hubert THIERRY.

Court should have held that the Tribunal had not accomplished its task even though no legal obstacle prevented it from so doing, and should have drawn the appropriate consequences from this shortcoming.

III

In paragraphs 66 to 68 of its Judgment, the Court, after observing that the Award "has not brought about a complete delimitation of the maritime areas appertaining respectively to Guinea-Bissau and to Senegal", took note of the fact that Guinea-Bissau had filed in the Registry of the Court a second Application requesting the Court to adjudge and declare "what should be . . . the line (to be drawn on a map) delimiting all the maritime territories appertaining respectively to Guinea-Bissau and Senegal". It also took note of the declaration made by the Agent of Senegal that one solution:

> "would be to negotiate with Senegal, which has no objection to this, a boundary for the exclusive economic zone or, should it prove impossible to reach an agreement, to bring the matter before the Court".

The Court, finally, considered it

> "highly desirable that the elements of the dispute that were not settled by the Arbitral Award of 31 July 1989 be resolved as soon as possible, as both Parties desire".

This observation corresponds to the interest of both countries and one should associate oneself with it. But it is also necessary to arrive at an understanding on the meaning of the phrase "the elements of the dispute that were not settled by the Arbitral Award of 31 July 1989". In my opinion, as expressed above, these unsettled elements of the dispute are its essential part, that is to say the determination of the maritime boundary between the two States, delimiting the whole of the maritime areas appertaining respectively to each of them, a boundary which will fall to be determined equitably in accordance with the principles and norms of international law accepted by Senegal and Guinea-Bissau.

(Signed) Hubert THIERRY.

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INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING BORDER AND TRANSBORDER ARMED ACTIONS

(NICARAGUA *v.* COSTA RICA)

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

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The present volume contains the Application, Memorial and correspondence concerning the *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* case. This case, which was entered on the Court's General List on 28 July 1986 under Number 73, was removed from the list by an Order of the Court of 19 August 1987, following discontinuance by the Applicant Government (*Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica), Order of 19 August 1987, I.C.J. Reports 1987*, p. 182).

The case having come to an end in this way, the Annexes to the Memorial will not be reproduced.

The pagination and the cross-references in the Memorial have been altered for the purpose of the present edition.

The Hague, 1991.

Le présent volume reproduit la requête, le mémoire et la correspondance relatifs à l'affaire des *Actions armées frontalières et transfrontalières (Nicaragua* c. *Costa Rica)*. Cette affaire, inscrite au rôle général de la Cour sous le n° 73 le 28 juillet 1986, en a été rayée par ordonnance de la Cour du 19 août 1987 à la suite du désistement du gouvernement demandeur (*Actions armées frontalières et transfrontalières (Nicaragua c. Costa Rica), ordonnance du 19 août 1987, C.I.J. Recueil 1987*, p. 182).

L'affaire s'étant ainsi terminée, les annexes au mémoire ne seront pas reproduites.

La pagination et les renvois du mémoire ont été modifiés aux fins de la présente édition.

La Haye, 1991.

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APPLICATION INSTITUTING PROCEEDINGS SUBMITTED BY THE GOVERNMENT OF NICARAGUA

REQUÊTE INTRODUCTIVE D'INSTANCE PRÉSENTÉE PAR LE GOUVERNEMENT DU NICARAGUA

MINISTERIO DEL EXTERIOR,
MANAGUA,
NICARAGUA.

25 July 1986.

To the Registrar of the International Court of Justice, the undersigned being duly authorized by the Republic of Nicaragua and being the Ambassador of the Republic of Nicaragua accredited at The Hague:

I have the honour to refer to the provisions of Article XXXI of the Pact of Bogotá and to the Declarations made by the Republic of Nicaragua and by the Republic of Costa Rica respectively, accepting the jurisdiction of the Court as provided for in Article 36, paragraphs 1 and 2, respectively of the Statute of the International Court of Justice and, by virtue of the consent to the jurisdiction based upon those instruments, either jointly or separately, to submit, in accordance with Article 40 of the Statute and Article 38 of the Rules of Court, an Application instituting proceedings in the name of the Republic of Nicaragua against the Republic of Costa Rica on the following grounds:

I. STATEMENT OF FACTS

1. Late in 1981, Nicaragua obtained the first confidential information about the organization of armed bands in Costa Rica with the purpose of carrying out armed attacks against Nicaragua. Immediately after that information was received, a meeting was held on January 12, 1982, between the Nicaraguan Deputy Minister of Interior, Commander Luis Carrión, and the Deputy Minister of Security and Government of Costa Rica, Mr. Harry Whalsteim.

2. On April 15 of that same year, the Nicaraguan *contra* leader Edén Pastora Gómez held a press conference in San José, Costa Rica, in which he announced armed attacks against Nicaragua. This fact caused the Nicaraguan Government to send a diplomatic note to that country, dated April 16. In that note Nicaragua stated: "its concern about the possibility that groups and armed expeditions against Nicaragua be organized in your territory"; recalling also the international obligation of not permitting: "the use of national territory to promote and execute material acts with the purpose of initiating or promoting armed attacks or hostile actions against sovereign States"; requesting information from the Costa Rican Government about: "measures adopted or that will be adopted in order to prevent the use of national territory for the organization and implementation of threats made by the citizen Pastora Gómez".

3. On May 10, 1982, a C-47 aircraft of the Nicaraguan airline (Aeronica) was hijacked and taken to Costa Rica. On May 20 of that same year, a group of deserters from the Nicaraguan army, assassinated the officer in command of the border post of San Juan del Norte, and crossed the border into Costa Rica. In both cases the Government of Nicaragua requested the extradition and capture of the delinquents, but the Costa Rican authorities, in violation of their international obligations, took no action.

4. In an effort to prevent the deterioration of relations, the foreign ministers of both countries, during a meeting held in San José on June 15, 1982, decided to create a Mixed Commission.

5. Despite this positive step, the border incidents continued, and Nicaragua made these facts public in a communiqué dated May 21, 1982, indicating that:

> "interests foreign to the good of the Governments of our two nations are bent on provoking conflicts and tensions between Nicaragua and Costa Rica, in order to create the necessary conditions that will justify a foreign military aggression against Nicaragua".

6. During the second meeting of the Mixed Commission in San José, on July 28, 29 and 30 of 1982, the Government of Nicaragua:

> "expressed its concern about a series of border events: incursions, violations of our airspace and harassment provoked by elements hostile to the Nicaraguan revolution. Which, of course, does not include the Government of Costa Rica. This concern is addressed so that the Government of Costa Rica takes the necessary measures."

7. Nicaragua considers it appropriate to emphasize that in an effort to prevent an increased deterioration of the situation, and taking into consideration the growing aggressiveness of the United States Government and the growing involvement of Honduras in the illegal policy of force and intervention practised by the Government of the United States, Nicaragua decided at that time not to publish any armed attacks originating from Costa Rican territory, but to use the Mixed Commission for denouncing such attacks. This decision was taken with the agreement of the Costa Rican Government.

8. In spite of this will of Nicaragua, the increase in the armed actions on the border made it necessary for Nicaragua to modify its position in order to protect its national interests which were being damaged by the policy of discreet complaints. Moreover, this change of attitude by the Nicaraguan Government was influenced by the facts that the Costa Rican authorities did not take any specific measures to prevent these attacks, and also that top officials of the Government were collaborating in various ways with the *contras*.

9. On December 1, 1982, a group of *contras* attacked the border village of Cardenas. They were backed by an aircraft that approached from Costa Rica. This village is located at a distance of 5 kilometers from the frontier, in an area where there are several Costa Rican observation posts because it is very near Peñas Blancas which is the most important border crossing point between the two countries and is situated on the Pan-American Highway. This attack lasted nearly five hours and could not possibly have been ignored.

10. From 1982 onwards, the armed attacks against Nicaragua increased in frequency and intensity. The situation has been especially serious in the region of the San Juan river because of geographical factors: on the Nicaraguan side, it is heavily forested and lacks land access, while on the Costa Rican side there is a larger population and many access routes.

11. Since it is not necessary to go into extensive detail and enumeration of the many illegal attacks which originated from Costa Rica, the present intention is to mention only certain recent examples of the types of activities which have given rise to the bringing of this case before the Court:

(i) On September 28, 1983, a numerous *contra* group from Costa Rica attacked the villages of Cardenas, Sapoa and the customs office in Peñas Blancas at 5.10 a.m. The assault was rebuffed and the *contras* returned to Costa Rican territory from where they continued attacking the offices in Peñas Blancas and surrounding areas. That action resulted in the death of three Nicaraguans, the wounding of nine others and the destruction of the customs office.

(ii) On April 6, 1984, a numerous *contra* group initiated armed attacks from Costa Rican territory against the border post of San Juan del Norte on the Caribbean coast of Nicaragua. The attacks continued uninterrupted and on April 16 a *contra* group of more than 500 men attacked the area. On April 28 Nicaragua protested again to Costa Rica, and provided an annex containing detailed information about the *contra* activities in that country. As a result of this incursion a significant number of Nicaraguan citizens were either killed, wounded, or forcibly abducted. The persons abducted were later returned to Nicaragua through our Embassy in Costa Rica. During the time they were in the hands of the Costa Rican authorities, they were the object of threats and inducements on the part of those authorities in order to convince them to desert from the Nicaraguan army and request asylum in Costa Rica.

(iii) On May 7, 1984, a group of about 100 *contras* attacked Palo de Arco (a border post) during which four civilians were murdered, among them two children. A Costa Rican civil guard post known as "El Chachito" is very close to that sector.

(iv) On October 20, 1984, the customs post of Peñas Blancas was again attacked by *contra* forces from Costa Rican territory.

(v) From July 17 until July 22, 1985, *contra* groups located in Costa Rican territory attacked positions of the Nicaraguan army in the region of San Rafael, 20 kilometers east of Boca de San Carlos. This is situated in front of the Costa Rican location known as "Remolinitos". The attack was with mortars, cannons and 50 calibre machine guns. Seven Nicaraguan soldiers were wounded.

(vi) On August 7, 1985, at approximately 7.45 a.m., 47 persons were abducted and taken into Costa Rica. Among them were 29 United States citizens of the Organization Witnesses for Peace. This occurred when they were sailing on the Nicaraguan river San Juan. After their liberation on August 8, they were illegally captured when returning to San Carlos by the Costa Rican Civil Guard.

(vii) On October 30, 1985, the border post of Boca de San Carlos was attacked from Costa Rican territory. On this occasion the *contras* used vehicles for transport in spite of the existence of a Costa Rican civil guard post in that area.

(viii) On January 31, 1986, in the Hotel Ambassador of San José, leaders of the *contra* group known as ARDE held a press conference in which, among other things, they stated their need of fuel in order to continue monitoring the river San Juan — which is Nicaraguan. This operation had been conducted with the active co-operation of the Costa Rican authorities.

(ix) On April 22, 1986, *contra* groups stationed in Costa Rican territory attacked a civilian ship near the sector of the island known as Sombrero de Cuero, situated 37 kilometers south-west of San Carlos. One person was wounded and another missing as a result of this action.

(x) On May 29, 1986, a group of *contras* attacked with mortar fire from Costa Rican territory the border post of San Juan del Norte.

(xi) On June 1, 1986, a group of approximately 15 persons, wearing the uniform of the Guardia Civil of Costa Rica, attacked from Costa Rican territory the observation post of Las Conchitas which is situated 10 kilometers south-west of Peñas Blancas.

12. Against the background of attacks which have been described, the attitude of the Government of Nicaragua has been to try as much as possible to avoid confrontations with the Costa Rican Government. To this effect, efforts towards a peaceful solution were made by means of direct bilateral conversations which resulted at that time in the creation of the Mixed

Commission: the Contadora Group helped to create a Commission for Prevention and Supervision; and, with the good offices of France, two rounds of negotiations were held in Paris in October 1984, with the purpose of creating a neutral zone between the two countries under international supervision.

13. All these efforts failed because of the position adopted by the Costa Rican authorities of not taking any specific measures against the activities of the *contras* inside Costa Rican territory.

II. LEGAL GROUNDS ON WHICH THE CLAIM IS BASED

14. On the basis of the above statement of facts, Nicaragua claims that Costa Rica has incurred legal responsibility for the breach of major obligations arising under the United Nations Charter and other multilateral treaties, and also from the breach of certain well-established obligations of customary international law. The particular legal grounds on which Nicaragua bases its claim are as follows.

1. Breaches of the Charter of the United Nations

15. The facts on which Nicaragua relies disclose serious and persistent violations of the provisions of the United Nations Charter, Article 2, paragraph 4, according to which all Members of the United Nations shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. In particular the assistance provided by Costa Rica to the somocista armed bands in their attacks on the territory of Nicaragua and its civilian population (as described above) constitute the use of force against the territory of Nicaragua.

2. Breaches of the Charter of the Organization of American States

16. The acts of Costa Rica (as described above) constitute serious and persistent violations of the provisions of Article 18 of the Charter of the Organization of American States, according to which Costa Rica is under the obligation not to intervene directly or indirectly for any reason whatsoever in the internal or external affairs of Nicaragua, whether by armed force or by any other form of interference or attempted threat against the personality of Nicaragua or against its political, economic or cultural elements.

17. The acts of Costa Rica also involve serious and persistent violations of the provisions of Article 20 of the Charter of the Organization of American States, according to which the territory of Nicaragua is inviolable and must not be subjected to military occupation or other forcible measures, directly or indirectly, on any grounds whatever.

3. Breaches of the American Treaty for the Peaceful Settlement [of Disputes] (Pact of Bogotá)

18. The acts of Costa Rica (as described above) constitute further serious and persistent violations of the provisions of Article I of the American Treaty for the Peaceful Settlement of Disputes ("Pact of Bogotá"), according to which Costa Rica is under an obligation to abstain from the threat or use of force, or any coercion, as a means of settling disputes.

4. *Breaches of the Obligation of Customary International Law not to Intervene in the Affairs of Another State*

19. A significant element in the conduct of Costa Rica in the relevant period (as described above) has been the pattern of assistance to and toleration of the violent actions of armed bands of somocistas operating against Nicaragua from bases within Honduras. The conduct of Costa Rica in this respect involves serious and persistent violations of the well-established obligation of customary international law not to intervene in the affairs of Nicaragua. The serious character of the violations is enhanced by the publicly proclaimed objective of the *contras* and their supporters in Costa Rica to overthrow the Government of Nicaragua.

5. *Breaches of the Obligation of Customary International Law not to Use Force against Another State*

20. The policy of assistance to the armed bands of somocistas adopted by Costa Rica involves breaches of the obligation of customary international law not to use force against another State; and so also the direct attacks against Nicaragua by the armed forces of Costa Rica constitute serious breaches of this same obligation.

6. *Breaches of the Obligation of Customary International Law not to Violate the Sovereignty of Another State*

21. The policy of assistance to the armed bands of somocista adopted by Costa Rica (as described above) constitutes breaches of the obligation not to violate the sovereignty of another State.

7. *Breaches of the Obligation of Customary International Law not to Kill, Wound or Kidnap the Citizens of Other States*

22. The conduct of Costa Rica (as described above) constitutes serious and persistent breaches of the obligation under customary international law not to kill, wound or kidnap the citizens of other States.

III. THE NATURE OF THE CLAIM

23. On the basis of the foregoing statement of facts and considerations of law, Nicaragua, reserving the right to supplement or to amend this Application and subject to the presentation to the Court of the relevant evidence and legal argument, requests the Court to adjudge and declare as follows:

(a) that the acts and omissions of Costa Rica in the material period constitute breaches of the various obligations of customary international law and the treaties specified in the body of this Application for which the Republic of Costa Rica bears legal responsibility;

(b) that Costa Rica is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations;

(c) that Costa Rica is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under the pertinent rules of customary international law and treaty provisions.

24. Nicaragua reserves the right to present a request that the Court indicate interim measures of protection.

25. The Government of Nicaragua has designated the undersigned as its Agent for the purposes of these proceedings. All communications relating to this case should be sent to the Embassy of the Republic of Nicaragua, The Hague, Wattstraat 19.

Respectfully submitted,

(Signed) Carlos Argüello Gómez,

Agent of the Republic
of Nicaragua.

MEMORIAL OF NICARAGUA

MÉMOIRE DU NICARAGUA

PART ONE

THE EVIDENCE OF COSTA RICA'S LEGAL RESPONSIBILITY FOR MILITARY AND POLITICAL ACTIVITIES INTENDED TO OVERTHROW THE GOVERNMENT OF NICARAGUA

INTRODUCTION

1. On 28 July 1986, Nicaragua filed its Application in the Court alleging that Costa Rica, by organizing, assisting, fomenting, participating in and tolerating acts of armed force in and against the territory of Nicaragua, committed by armed bands of counter-revolutionaries based in Costa Rican territory had violated its obligations to Nicaragua under international law. The Application asked that the Court declare the conduct of Costa Rica to be in breach of international law and to order Costa Rica to cease and desist from such activities. It requested the Court to declare that Costa Rica is under a duty to make compensation for all injury caused to Nicaragua by the breaches of international law found by the Court.

2. On 17 October 1986, time-limits were set for the presentation of written Memorials on the merits of the case, under which the Memorial of Nicaragua was to be filed on 21 July 1987, and the Memorial of Costa Rica was to be filed nine months later. On 16 July 1987, the Court extended the date for the presentation of Nicaragua's Memorial to 10 August 1987.

CHAPTER I. SUMMARY AND OVERVIEW OF THE EVIDENCE

3. The Government of Costa Rica has permitted counter-revolutionary organizations dedicated to the armed overthrow of the Government of Nicaragua to use Costa Rican territory to conduct military and political activities against Nicaragua, and has actively collaborated in these activities. Costa Rica's actions constitute a blatant and ongoing intervention in Nicaragua's internal affairs, and a use of force against Nicaragua, in violation of its legal obligations to Nicaragua under general international law, the Charters of the Organization of American States and the United Nations, two bilateral treaties of amity, the Convention on Duties and Rights of States in the Event of Civil Strife, and other multilateral instruments.

A. The Use of Costa Rican Territory with the Knowledge and Approval of the Costa Rican Government

4. There is overwhelming evidence that Nicaraguan counter-revolutionary (or "*contra*") organizations have used Costa Rican territory to conduct military and political activities aimed at overthrowing the Government of Nicaragua by armed force. At least two of these politico-military organizations, ARDE[1] (from 1982 to mid-1986) and UNO[2] (from mid-1985 to 1987) were permitted by Costa Rican authorities to establish headquarters facilities in San José, and to maintain numerous military camps in the northern part of the country, close to the border with Nicaragua. The headquarters facilities were used to hold regular public assemblies of *contra* leaders, where military and political strategies were developed for forcibly replacing the Government of Nicaragua, for organizational activities in connection with this effort, for issuing public declarations calling for armed struggle against the Nicaraguan Government, and for co-ordinating supply and logistical services in support of the military activities conducted from the camps in the north.

5. The military camps themselves were used as staging points for armed attacks in and against Nicaragua, as safe havens for *contra* forces after completion of their combat missions inside Nicaragua, as training grounds for new recruits, and as military supply depots. By 1985, at least 27 of these camps were in operation. (Ann. C, Attachment 5, Table 1.) There were also at least nine airstrips in Costa Rican territory that were used to airdrop supplies to *contra* forces during missions inside Nicaragua. (Ann. C, Attachment 5, Table 2.) The evidence demonstrates that this was no small-scale operation, but a full-fledged war effort. According to the United States Ambassador to Costa Rica, as many as 2,800 *contra* combatants operated from the Costa Rican camps, spread all along the border with Nicaragua. (Ann. I, Attachment 63.) They were heavily armed with automatic weapons, mortars, grenade launchers and even a small air force and navy. In five years of continuous fighting, they carried out more

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[1] Alianza Revolucionaria Democratica, or Democratic Revolutionary Alliance.

[2] United Nicaraguan Opposition.

than 350 attacks inside Nicaragua, mostly by land but also by air and sea. There have been hundreds of airdrops of supplies to *contra* forces inside Nicaragua originating from Costa Rican airstrips. The consequences to Nicaragua, with a population of barely 3 million and a per capita gross national product of $770, have been staggering both in human and economic terms[1].

6. The evidence is equally overwhelming that these activities were conducted with the knowledge and approval of the Costa Rican Government at its highest levels. Costa Rica could hardly be unaware of the existence of *contra* headquarters in its own capital city, of the much publicized presence of *contra* military and political leaders, of the frequent public assemblies and declarations calling for the armed overthrow of the Nicaraguan Government, or the countless other daily activities of these organizations aimed at that end. It is equally inconceivable that Costa Rica could have been unaware of the extensive and continuous military activities of the *contras* based in Costa Rican territory. Like the *contras'* political activities in San José, their military activities in the northern part of the country have always been matters of public knowledge in Costa Rica. The existence of the camps, the training activities conducted there and the constant cross-border attacks on Nicaragua have been reported regularly in the Costa Rican press, and in the newspapers that the *contra* organizations themselves are permitted to publish and distribute in Costa Rica. The *contras'* use of Costa Rican territory to wage war on Nicaragua has been so open that it is recognized in official publications of the United States Department of State, such as the *Dictionary of International Relations Terms* (1987), which defines the word "Contras" as follows:

> "Shortened form of the word 'countrarevolucionarios' (counter-revolutionaries), the term the Sandinista regime in Nicaragua uses for the guerrilla forces fighting against them. The Contras comprise former members of the Somozist National Guard, dissident right-wing former Sandinistas, and the Miskito Indian minority; each of these forces operates independently. *The Contras operate from bases in Honduras and Costa Rica*, and receive political and material support from the United States. There have been recurrent armed clashes between Sandinista government troops and the rebels since March 1982." (Ann. F, Attachment 1, p. 23 (emphasis supplied).)

7. Between 1982 and 1987, Nicaragua delivered to Costa Rica more than 150 diplomatic notes protesting the *contras'* activities in or emanating from Costa Rica, in many cases providing detailed evidence of the use of Costa Rican territory and the active collaboration or participation of Costa Rican officials. (See, e.g., Ann. A, Attachments 109, 125, 172, 207, 228, and 237 (Diplomatic Notes of Nicaragua).) Nicaragua delivered similar protests to the bilateral Mixed Commission that functioned from 1982 to 1984, and the Commission of Supervision and Prevention, established in 1984 through the good offices of the Contadora Group. (Ann. B, Attachments 1 and 2.) Both commissions were established at Nicaragua's urging in order to investigate and help resolve disputes arising from military activities by *contra* forces based in Costa Rica. (See also Ann. B, Attachment 3.) Both directly and through these commissions, Nicaragua presented Costa Rica with concrete proof of the existence and locations of the following *contra* military camps inside Costa Rica, *inter alia*:

1. *El Infierno* — 5.5 km south-east of Peñas Blancas.
2. *Barra de Colorado* — 22.5 km south-west of San Juan del Norte.

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[1] International Bank for Reconstruction and Development, *World Development Report 1987*, Oxford University Press (1987).

3. *El Valle* — 9.5 km west of Cardenas.
4. *Las Vueltas* — 7.5 km south of Peñas Blancas.
5. *Quebrada de Agua* — 17 km south-west of Peñas Blancas.
6. *El Murciélago* — 35 km south-west of Peñas Blancas.
7. *Los Andes* — 5 km north-east of El Naranjo (Monte Plata).
8. *La Libertad* — east of Peñas Blancas.
9. *Sarapiqui* — 28 km south-west of San Juan del Norte.
10. *Luna Azul* — 10 km south-west of El Castillo.
11. *Luna Blanca* — south-west of El Castillo.
12. *Tango Rojo 2* — 500 meters from Los Chiles, along the border.
13. *Tango 1 and 2* — in the El Castillo sector.
14. *21 and 22* — 12.5 km south-west of the El Papaturro border post.
15. *Hacienda Conventillo* — 3 km east of El Naranjo.
16. *San Dimas* — 4 km south of Peñas Blancas.
17. *El Amo* (Hacienda) — 21 km south of Peñas Blancas.
18. *Verdum* — 11 km south-east of Cardenas.
19. *Santa Cecilia* (Hacienda) — 14 km south of Mexico, along the border.
21. *El Refugio* — 2 km south of the Fátima border post.
22. *Los Angeles* — 6 km south of Fátima.
23. *Berlín* (Hacienda) — 11 km from Fátima.
24. *Santa Isabel* (Hacienda) — 8 km south of Fátima.
25. *Cerro Crucitas* — 5 km south of Río El Infiernito.
26. *Fincas El Chivito and Escalera* — 15 km south-west of El Castillo.
27. *Laguna Garza* — 8 km south of the San Juan delta. (Ann. C, Attachment 5, Table 1.)

8. As of the date of Nicaragua's Application to this Court, Costa Rica had made no serious effort to curtail the military activities of the *contras* emanating from these and other *contra* camps, or to restrict the other *contra* activities addressed in the diplomatic correspondence. Indeed, Costa Rica's refusal to acknowledge responsibility for the armed attacks against Nicaragua emanating from its own territory, or to take appropriate remedial measures, resulted in the failure of both the Mixed Commission and the Commission of Supervision and Prevention.

B. The Active Collaboration of the Costa Rican Government in Military and Political Activities against Nicaragua

9. While Costa Rica's approval of the *contras'* military and political efforts to overthrow the Nicaraguan Government may be presumed from its undeniable knowledge of these activities and its failure to take appropriate action to curtail them, there is also abundant and irrefutable direct evidence that Costa Rican Government officials, at the highest level, actively collaborated with and assisted the *contras* in these efforts. For example, it is now fully admitted on the public record that Costa Rican President Luis Alberto Monge personally and officially approved the construction of a major airbase in northern Costa Rica for the purpose of resupplying the *contra* forces inside Nicaragua. He did so at the request of the Ambassador of the United States, Lewis A. Tambs. In his sworn testimony in the Joint Hearings on the Iran-Contra Investigation of the United States Congress, Ambassador Tambs confirmed that the airbase was approved by Costa Rican authorities:

> "Q: With regard to the airstrip that was constructed in Costa Rica, is it fair to say that that was done only after permission was granted by the authorities of Costa Rica?
>
> "A: Yes, sir." (Ann. F, Attachment 3 (Testimony of Mr. Tambs, p. 35-1)[1].)

President Monge has publicly acknowledged that he himself granted this permission. (Ann. I, Attachment 56.) And the testimony of other knowledgeable witnesses in the United States congressional investigation has established that senior officers from the Costa Rican Civil Guard chose the site for the airbase, obtained the permits and licenses necessary for its construction and supervised the entire project. (See, e.g., Ann. F, Attachment 3 (Testimony of Joe Fernandez, alias "Tomás Castillo", pp. 38-42, 99).)

10. The evidence establishes that the Civil Guard and the Rural Guard — the two Costa Rican security forces that should have been dispatched to close down the *contra* camps and airstrips and to curtail all hostile activities against Nicaragua — instead have been allowed by the Costa Rican Government to assist the *contras* and facilitate their attacks on Nicaragua. The Costa Rican security forces are a professional army in all but name. Totalling more than 9,500 officers and enlisted men, armed and equipped principally by the United States, they have been fully capable of preventing the *contras* from using Costa Rican territory to attack Nicaragua[2]. Indeed, Costa Rica itself has consistently maintained that it exercises "absolute" control over the entire border region. (See, e.g., Ann. A, Attachments 106, 131, 137, 138, 142, 144, 148 and 245 (Diplomatic Notes of Costa Rica).) The Government's failure to impede the *contras'* military activities, therefore, has provoked internal protests by professionally-minded, middle- or lower-level Costa Rican officials. For example:

> "In Los Chiles [in northern Costa Rica, site of a major *contra* military camp], there is much activity by both sides; according to rumors, it is feared that there will be an act of terrorism near Upala. *There is talk of movements by members of the counter-revolution, and the Commander of the Civil Guard does absolutely nothing* . . ." (Ann. D, Attachment 5 (30 August 1983, report from Costa Rican Director of Intelligence and Public Security to the Minister of Public Security).)

11. In an official report submitted to the Vice Minister of Public Security, a lieutenant colonel in the Civil Guard complained that:

> "the subversives [i.e., *contras*] travel freely through the entire zone, without encountering any opposition from the respective authorities . . .".

A subsequent report from the same officer states that:

> ". . . the immigration controls are deficient and any foreigner is given legal documentation in Liberia [in northern Costa Rica] . . . We have detected

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[1] Joint Hearings on the Iran-Contra Investigation of the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Committee to Investigate Covert Arms Transactions with Iran. The Joint Hearings, which commenced on 5 May 1987, are continuing as of the date of this Memorial. Accordingly, Nicaragua may wish to supplement this Memorial and Annexes with additional transcripts and records produced at the hearings should they contain material that is relevant to this case.

[2] The International Institute for Strategic Studies, *The Military Balance 1986-1987*, London, 1987.

> that there are 'safe houses' in La Cruz which are used, among other things, to recruit combatants and send them to Honduras. The same is true of Liberia and Canas. We recommend an investigation and 'clean-up' of those towns by National Security.
>
> *We cannot disregard the assistance which the counterrevolutionary and non-counterrevolutionary elements have received from persons who form part of this Government* . . ." (Ann. D, Attachments 6 and 7 (two 29 August 1983 memoranda from Lt. Col. Mario Araya to the Vice Minister of Public Security).)

12. In May 1985, Col. Ricardo Rivera, a former chief of the Rural Guard, stated at a press conference that officials of the Costa Rican Government maintained close ties with the *contras*, and that the *contras* operated from military camps in Costa Rica with the complicity of ranking government and security officials. (Ann. H, Attachment 58.) During the same month, in legal proceedings in the Costa Rican courts, foreign mercenaries who had served with the *contras* in Costa Rica and Nicaragua testified that Rural Guard officers and enlisted men assisted in the establishment of a *contra* training base in northern Costa Rica. (Ann. G, Attachment 2, p. 23.) In subsequent public statements, they provided details of the active collaboration of the Civil Guard in their military efforts against Nicaragua:

— The Civil Guard gave them precise information, including maps and diagrams of targets inside Nicaragua.
— The Civil Guard actively helped them in an attack on the Nicaraguan border post of La Esperanza.
— Civil Guard officers made frequent friendly visits to *contra* training camps in northern Costa Rica and promised them protection. (See, e.g., Ann. H, Attachment 59; Ann. I, Attachment 18.)

13. The collaboration of the Costa Rican security forces with the *contras* was not contrary to official Costa Rican policy, but in furtherance of it. Public statements by senior government officials demonstrate that they shared the *contras'* ultimate objective: to change the Government of Nicaragua by military force. In June 1985, for example, Foreign Minister Carlos José Gutierrez publicly stated that he would regard a change of Government in Nicaragua with approval, and he called upon the United States Congress to enact legislation approving millions of dollars of military assistance for the *contras*. (Ann. I, Attachment 16.) President Monge, too, appealed to the United States Congress to approve President Ronald Reagan's request for an appropriation of $14 million for military assistance to the *contras*. (Ann. I, Attachment 15.)

14. In the *Military and Paramilitary Activities in and against Nicaragua*, the Court found that United States support for the *contras*, in "training, arming, equipping, financing and supplying the *contra* forces", constituted unlawful intervention in Nicaragua's internal affairs, and the illegal use of force against Nicaragua. (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, ICJ Reports 1986*, p. 146 (hereinafter *Nicaragua* v. *United States*).) The Court found that United States support for the *contras* was so pervasive that

> "the *contra* force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States". (*Id.*, p. 63.)

Yet, as dependent as the *contras* were on the "multi-faceted" support of the United States, they could not have operated at all without the particular support they received from Costa Rica and Honduras. For without military bases in Costa Rican and Honduran territory, the *contras* would not have been able to carry out any armed attacks on Nicaragua, regardless of the amount of material and other support they received from the United States. Thus, it was essential to the United States, if its own support for the *contras* was to have any impact, to secure the collaboration of Costa Rica and Honduras. It is hardly coincidental, then, that from 1982 to 1985 United States economic assistance to Costa Rica rose from $7.1 million to $220 million; United States military assistance to Costa Rica, which was only $0.5 million in 1982, rose to $11.2 million in 1985, a sum that exceeded United States military assistance to Panama for that year[1].

15. For whatever reason — monetary reward or shared ideological conviction — Costa Rica's collaboration with the United States in supporting the *contras* was secured. As set forth in the detailed chronology that follows this introductory section, and as summarized below, Costa Rica's collaboration went through three distinct phases: the first, from the end of 1981 through the middle of 1985; the second, from the middle of 1985 through the filing of Nicaragua's Application in this case; and the third, from the time of Nicaragua's Application to the present.

C. The First Phase: Late 1981 to Mid-1985

16. The *contras* began attacking Nicaragua from Costa Rican territory in the final months of 1981; however, the first phase of Costa Rica's collaboration with *contras* began in earnest on 15 April 1982, when Edén Pastora was permitted to hold a press conference in San José calling for the armed overthrow of the Nicaraguan Government and announcing the formation of a guerrilla force, to be headed by Pastora himself, to fight against the Government. (Ann. H, Attachments 7, 8, 9, 10.) Pastora was permitted to organize and train his force in Costa Rica and to begin mobilizing for armed attacks on Nicaraguan installations and troops. (Ann. H, Attachment 11.) In September 1982, another press conference was held in San José to announce the formation of ARDE, a coalition of Pastora's guerrilla organization, the Sandino Revolutionary Front (FRS); another guerrilla group headed by Fernando ("El Negro") Chamorro (known as the UDN/FARN, and which had actually begun conducting raids on Nicaraguan territory from Costa Rican base camps in late 1981)[2]; the Nicaraguan Democratic Movement (MDN), a political organization headed by Alfonso Robelo, a former member of the Nicaraguan Government Junta; and Misurasata, an organization of Miskito, Sumo and Rama Indians headed by Brooklyn Rivera. (See Ann. E, Attachment 2, Nos. 4, 5.) The leaders of the new coalition called for the unification of military and political groups seeking the overthrow of the Government of Nicaragua. (*Id.*; see also Ann. E, Attachment 2, Nos. 3, 6.)

17. From 1982 until the middle of 1985, the United States and Costa Rica provided vital support to ARDE. The United States provided financial assistance and arms. Costa Rica permitted ARDE to maintain military bases

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[1] United States Agency for International Development, *US Overseas Loans and Grants*, 1987.

[2] Nicaraguan Democratic Union — Revolutionary Armed Forces of Nicaragua.

throughout the northern part of the country and to use Costa Rican territory to launch armed attacks on Nicaragua. Costa Rica also permitted ARDE to maintain its political and military headquarters in San José, and to openly conduct the full range of political and logistical activities necessary to support the war effort. (See Ann. E, Attachment 1 (Pamphlet of the Opposition Bloc of the South (BOS); Ann. H, Attachments 34, 47, 50; Ann. A, Attachment 106 (Diplomatic Note of Costa Rica); Ann. C, Attachments 1, 3, 4.)) The Costa Rican Government's collaboration with the *contras* and the United States was so open and extensive that protests arose from sectors of the Government and population anxious to preserve Costa Rica's international image and its official policy of "neutrality". In response to these protests, the Government insisted that Pastora and Chamorro and their forces keep a low profile, so that their activities in or from Costa Rica could be plausibly denied. Occasionally, when their activities became too open or notorious, the Government made a public show of its efforts to restrain them. For international consumption, the Government "arrested" Pastora on various occasions and "expelled" him from the country at least twice. However, he was always released from custody, or allowed back into Costa Rica, where his military activities continued, within a brief time. (See *infra*, para. 35.) Occasionally, members of Pastora's force were also detained, but again, they were generally released within a short time and allowed to resume fighting. (See, e.g., Ann. H, Attachment 14.) Most important, ARDE continued to maintain military camps in Costa Rica and its attacks in and against Nicaragua did not abate. Nor was there any cessation of, or limitation imposed upon, ARDE's political activities in San José.

18. ARDE's military activities against Nicaragua hit full stride in 1983, and over the next three years it carried out much-publicized aerial bombings of vital economic installations in Nicaragua, including the international airport at Managua on 8 September 1983. (See *infra*, para. 54.) ARDE also launched seaborne assaults on oil storage tanks, destroying more than 300,000 gallons of fuel at the port of Benjamín Zeledón on 2 October 1983. (See *infra*, para. 58.) On the ground, there were scores of armed attacks on Nicaraguan villages, customs houses and military posts. The forces of Pastora and Chamorro, augmented by special units of the FDN (Fuerza Nicaraguense Democratica) — the main *contra* army operating out of Honduras — constituted a veritable "Southern Front" of the counter-revolution, threatened as much damage to Nicaragua as the *contra* effort based in Honduras. Some of the Costa Rica-based *contra* attacks involved large concentrations of forces. Most notorious was ARDE's attack on the border town of San Juan del Norte, which commenced on 6 April 1984. Approximately 500 *contras*, coming from Costa Rica, stormed the town with mortars and machine guns. After six days of fierce fighting, during which the *contras* were regularly resupplied by boat from Costa Rica, they succeeded in taking the town. Costa Rican authorities, including officials of the Rural Guard, facilitated the resupply operation, as well as the transport of journalists from San José to San Juan del Norte to report on the *contras'* capture of Nicaraguan territory. (See *infra*, para. 68.)

19. While the Costa Rican-based *contras* continued to harass Nicaragua from the south, and to cause considerable death and destruction in the process, they proved unable to weaken, let alone overthrow, the Nicaraguan Government. Their lack of success in this regard led to internal dissension. Concerned about this situation, in July 1984 the United States Central Intelligence Agency sent Joe Fernandez (alias "Tomás Castillo") to San José to serve as CIA Station Chief. (Ann. F, Attachment 3 (Testimony of Mr. Fernandez, p. 16).) According to Mr. Fernandez, in his sworn testimony in the Joint Hearings on the Iran-

Contra Investigation of the United States Congress, his instructions from Washington were (i) to bring about a new, unified *contra* political organization, based in Costa Rica and (ii) to reorganize the *contra* military forces in Costa Rica, turn them into a more effective fighting force, and ultimately move them from their camps in Costa Rica to forward bases in Nicaragua. (*Id.*, pp. 18-19, 23-24.) Mr. Fernandez testified that United States strategy called for Costa Rica to serve as the principal political base for *contra* efforts to overthrow the Government of Nicaragua; Costa Rica was "where we felt — we, CIA, felt — that the primary value to the program was the political side". (*Id.*, p. 23.) In carrying out his duties, Mr. Fernandez worked in close co-operation with senior Costa Rican officials. As Mr. Fernandez himself described his activities during this period:

> "My view of my responsibility was to develop the southern political organizations in concert with the efforts being made here in Washington and in [deleted by United States Government censors] and in Miami to bring together the Nicaraguan resistance under one unified leadership. . . .
>
> All of us were pulling together with these people and out of that came the obvious necessity that there was a military side to the resistance effort. . . .
>
> We, in turn, encouraged the leadership to seek every means that they could to put pressure on the Sandinista regime. . . ." (*Id.*, pp. 18-19.)

He continued:

> "It was really encouragement to [deleted] go into Nicaragua, where if they claimed they were fighters is where they should be. And so it came about because of continuous large numbers of problems that we were experiencing with the [Costa Rican] government — because of the presence of these people who were not very covert in their — in protecting the fact of their presence in [Costa Rica] and there were a number of incidents on a continuing basis that the [Costa Rican] officials would bring to my attention and to the attention of other [deleted] officials, and so whenever I had contact with them, for whatever reason [deleted] I would encourage them to seek some means to leave [Costa Rica] where we felt — we, CIA, felt — that the primary value to the program was the political side.
>
> In other words, [Costa Rica] presented a better environment for the political declarations to be made, access to [San José] where there was relative tranquility, modern conveniences, daily flights to the U.S. and so forth, and that is what the political side needed." (*Id.*, pp. 23-24.)

D. The Second Phase: Mid-1985 to 28 July 1986

20. By the middle of 1985, Mr. Fernandez and his CIA colleagues had succeeded in creating a new, unified *contra* political organization and in establishing Costa Rica as the political center of the counter-revolution. UNO, the United Nicaraguan Opposition — which joined together the heretofore separate *contra* organizations operating in Costa Rica and Honduras — came into existence in June 1985, with regional headquarters in San José. (Ann. E, Attachment 2, No. 17. See Ann. E, Attachment 3, Nos. 4, 7; Attachment 4, No. 7.) Thus began the second phase of Costa Rica's collaboration with the United States in support of the *contras*, a phase that was characterized by even

more open and extensive Costa Rican assistance than in the past. First, as indicated, the President and Foreign Minister of Costa Rica openly supported the *contras'* military and political objectives, publicly calling upon the United States Congress to appropriate additional funding for military and other assistance to the *contras*. Second, the Costa Rican Government permitted UNO — now the pre-eminent *contra* political and military organization — to use San José as its own headquarters, holding periodic public assemblies and organizing sessions, and issuing regular public pronouncements calling for the armed overthrow of the Nicaraguan Government. Third, Costa Rica's collaboration in the establishment of a revitalized Southern Front signalled a new and higher level of participation in the *contras'* military effort to overthrow the Nicaraguan Government.

21. In July 1985, Ambassador Tambs arrived in Costa Rica with explicit instructions from the United States Government's "Restricted Interagency Group", which oversaw all United States efforts in support of the *contras*, "to aid the Nicaragua Resistance Forces in setting up a 'Southern Front'". (Ann. F, Attachment 2, Report of the President's Special Review Board, 26 February 1987 ("Tower Commission Report"), p. C-12. See also Ann. F, Attachment 3 (Testimony of Mr. Tambs, p. 2-1).) As Mr. Fernandez testified to the Tower Commission:

> "When Ambassador Tambs arrived in Costa Rica, he called together the Deputy Chief of Mission, the Defense Attache and myself, and said that he had really only one mission in Costa Rica, and that was to form a Nicaraguan resistance southern front." (Ann. F, Attachment 2 (Tower Commission Report), p. C-12.)

22. Fernando "El Negro" Chamorro, formerly of the UDN/FARN and ARDE and now integrated into UNO, was chosen to command the newly-reorganized *contra* units based in Costa Rica. (Ann. I, Attachment 33; Ann. H, Attachment 60.) Ambassador Tambs testified that his objective was to "encourage them to fight" inside Nicaragua. (Ann. F, Attachment 2 (Tower Commission Report, p. C-12).) In the Joint Congressional Hearings, he explained:

> "[T]he question was, how you were going to get the armed democratic resistance out of Costa Rica, and, of course, that was something which both the Costa Ricans and we were interested in, and the only way that you could get them out of Costa Rica was assure them that they would have logistical support inside Nicaragua. . . ." (Ann. F, Attachment 3 (Testimony of Mr. Tambs, p. 29-1).)

23. Providing logistical support to *contra* forces inside Nicaragua required airstrips and supply depots in Costa Rica. Thus, the Costa Rican Government, at its highest levels, permitted the United States to deposit war materiel and other supplies intended for the *contras* in designated locations on Costa Rican territory, for subsequent aerial delivery — from airstrips inside Costa Rica — to *contra* units fighting in Nicaragua. As indicated above, it is a matter of public record that President Monge personally approved construction of the major airbase at Santa Elena. It was that very airbase that Lt. Col. Oliver North, Director of Political-Military Affairs for the United States National Security Council, and a member of the Restricted Interagency Group, described in an internal memorandum as "a vital element in supporting the resistance". (Ann. F, Attachment 2 (Tower Commission Report, pp. C-11 to C-12).) The Presi-

dent of the United States was told by his National Security Adviser, Vice Admiral John Poindexter, that the Santa Elena airbase "was a dramatic display of cooperation and support for the President's policy by the country involved". (Ann. F, Attachment 3 (Testimony of Adm. Poindexter, p. 5).)

24. *Contra* forces inside Nicaragua were resupplied from Costa Rica not only by air, but by sea as well. This "maritime" operation was personally approved by the Costa Rican Minister of Public Security, Benjamín Piza, an ardent and active supporter of the *contras*. Mr. Piza agreed to the operation early in 1985 in a meeting with Lt. Col. North. The meeting was described in a February 1985 memorandum from Lt. Col. North to Adolfo Calero, the director of the FDN:

> "[W]e ought to look at a maritime capability and something on the southern front. *I had a very useful meeting with the Security Minister of the place down south.* He has agreed to meet with you very discreetly, I will let you know when this can be arranged. *He is anxious to help, but only if it can be done without exposing him or making operations visible in his country.*" (Ann. F, Attachment 3 (Exhibits to Testimony of Oliver L. North, Exhibit OLN 258, p. 3) (emphasis added).)

25. With Mr. Piza's assistance, as well as that of Costa Rican port authorities, the maritime operation was in full swing by early 1986. As reported to Lt. Col. North by his special representative, Robert W. Owen, in a memorandum dated 7 April 1986:

> "Southern Maritime Operations
>
> On Friday [i.e., 4 April 1986], the third successful trip into Nicaragua was made by our maritime group.
>
> A cover operation has been established in [deleted] and we will soon be able to send in several trips a week. One boat is fully operational, another should be ready in 15 to 21 days and a third 21 days later.
>
> The operational part is being run strictly without Nicaraguans, except for the boat operators on each trip. *The local port officials are aware of the operation and approve, providing they don't get caught with arms and there are not a number of Indians running around.*" (Ann. F, Attachment 3 (Exhibits to Testimony of Robert W. Owen, Exhibit RWO-15, p. 2) (emphasis added).)

26. While some *contra* units did go to fight inside Nicaragua, and were resupplied from the airbase at Santa Elena and other airfields, and by sea, other units refused to abandon their Costa Rican base camps and continued conducting cross-border raids into Nicaragua, always returning to Costa Rica afterwards. As Mr. Fernandez testified:

> "Q: To summarize, it posed a political problem for you to have these Nicaraguans in [Costa Rica] didn't it?
>
> "A: Most definitely.
>
> "Q: And you tried to encourage them to get to Nicaragua and to fight to get them out of [Costa Rica]?
>
> "A: Yes sir.
>
> "Q: And there was a reluctance on the part of Negro Chamorro to go into Nicaragua and fight?
>
> "A: Yes sir." (Ann. F, Attachment 3 (Testimony of Mr. Fernandez, p. 25).)

27. At the end of 1985, there were 27 *contra* military encampments in Costa Rica. (Ann. C, Attachment 5, Table 1.) During the second half of 1985 and the first half of 1986, there were constant attacks from these camps directed against Nicaraguan villages, border posts, and troops. Most of the attacks were carried out under the auspices of UNO, which included Chamorro's forces and the FDN. However, Pastora and his forces, which refused to join UNO (and were therefore cut off from further assistance from the United States), continued to carry out military activities from their own camps in northern Costa Rica. (See *infra*, paras. 124-125.)

E. The Third Phase: Since 28 July 1986

28. The second phase of Costa Rica's collaboration with the United States and the *contras* drew to an end when Nicaragua filed its Application with this Court on 28 July 1986. Since then, the principal *contra* activity in Costa Rica has been political. Costa Rica has indeed become, as the United States intended, the political center of the counter revolution. UNO and its successor organization have been permitted to conduct their activities in San José openly and with impunity. (See *infra*, paras. 123-135, 141.) No limits whatsoever have been imposed on the *contras'* political activities in support of their armed struggle. In October 1986, for example, a three-day meeting of UNO's Consultative Assembly was held in San José, an Assembly that constituted

> "vital support — in every sense of the word — for the directorate of UNO and, by extension, for the combatants who are generously sacrificing themselves to open our path of return to our country". (Ann. E, Attachment 3, No. 8.)

In January 1987, the *contras* published and disseminated in San José, through their newspaper in that city, a "Document of Democratic Agreement of the Nicaraguan Resistance", which was signed by leaders of UNO and BOS (Bloque Opositor del Sur), another San José-based *contra* organization with its own military units operating from northern Costa Rica. The document called for "replacement of the totalitarian regime of the FSLN" with a "Provisional Government of National Unity, the principal objective of which will be the reordering of the structure of our society". (Ann. E, Attachment 4, No. 8 (*Nicaragua Hoy*, 1/24/87).)

29. The third phase of Costa Rica's support for the *contras*, thus far, has been characterized by a marked diminution in military activities against Nicaragua from Costa Rican territory. In part, this has resulted from the final defeat of Pastora and his forces by Nicaraguan Government troops. But it also has been the product of a conscious decision by the Costa Rican Government. To be sure, Costa Rica has continued to permit certain military activities in support of the *contras* in its territory. For example, it has allowed United States planes delivering supplies to *contra* forces in southern Nicaragua regularly to overfly Costa Rican territory, and it has permitted co-ordination of this resupply operation by United States Government personnel in San José. (See *infra*, paras. 136-140.) Although it closed down the notorious Santa Elena airbase, it allowed *contra* supply flights to refuel at San José's commercial airport, and allowed a network of *contra* airfields to remain in operation. (See *infra*, paras. 135-138.) However, it is notable that, coincident with the filing of Nicaragua's Application, Costa Rica suddenly discovered the means to restrict the armed attacks emanating from the *contras'* military bases in the north —

and these activities have dropped off substantially, although not entirely. The explanation for this turn of events was given by a captain in the Civil Guard who was involved in closing down the Santa Elena airbase in September 1986. It had to be closed down, he explained, "because it could affect Costa Rica's image in The Hague". (Ann. I, Attachment 46.)

CHAPTER II. CHRONOLOGICAL ACCOUNT OF COSTA RICA'S SUPPORT OF MILITARY AND OTHER ACTIVITIES AIMED AT OVERTHROWING THE GOVERNMENT OF NICARAGUA

30. Throughout the period from late 1981 to the present, the *contras* have used Costa Rica as a base for military activities against Nicaragua with the objective of overthrowing the Government by armed force. They have used San José as the political headquarters for their organizational and propaganda activities, and for the provision of combat support services. Without the military encampments, training facilities, command centers, intelligence posts and airstrips available to them on Costa Rican soil, the *contras* would not have been able to establish and maintain their critical "Southern Front". It is well documented that the Government of Costa Rica, at the highest levels, has at all times knowingly tolerated these *contra* activities on its territory, and has on numerous occasions actively assisted the *contras* in conducting their armed attacks in and against Nicaragua.

31. These activities and Costa Rica's knowledge of and complicity in them are demonstrated by, *inter alia*, admissions of officials of the Costa Rican Government; admissions, in sworn testimony before the United States Congress, of officials of the Government of the United States who participated in planning and implementing the *contras'* "Southern Front", and official United States Government reports on these events; diplomatic correspondence between Nicaragua and Costa Rica through which Costa Rica was repeatedly placed on official notice of the *contras'* activities on its territory; Nicaragua's routine, contemporaneous documentation of *contra* attacks launched from Costa Rica and logistical support operations conducted in Costa Rica; the publications and proclamations of *contra* organizations and their leaders in Costa Rica; sworn testimony before the Costa Rican courts of individuals involved in the *contras'* military activities against Nicaragua; and other independent, corroborative sources such as press accounts from Costa Rica and the United States.

A chronological account of these activities follows.

1981-1982

32. In 1981 and 1982, several organizations were formed which had as their objective the overthrow of the Government of Nicaragua through military and paramilitary operations against Nicaragua, waged wholly or in part from the territory of Costa Rica. One of the first such groups to form was the Nicaraguan Democratic Union (UDN) and its armed wing, the Nicaraguan Revolutionary Armed Forces (UDN/FARN). FARN, led by José Francisco Cardenal and Fernando "El Negro" Chamorro Rapaccioli, was "active in southern Nicaragua in 1981" and was "believed comprised of some 200 to 250 activists operating largely out of Costa Rica and Honduras" in early 1982, according to a 16 July 1982 report of the United States Defense Intelligence Agency. (Ann. F, Attachment 6, at p. 22.)

33. According to the Costa Rican National Security Agency, *contra* forces began using the zone along Costa Rica's northern border to train recruits in late

1981. (Ann. I, Attachment 2.) By early 1982, the presence of armed *contra* groups along Costa Rica's border with Nicaragua was widely reported, openly proclaimed by *contra* leaders, and acknowledged by Costa Rican officials. In January 1982, Costa Rica's Minister of Public Security and Administration, Arnulfo Carmona Benavides, confirmed the existence of the anti-Sandinista camps along the northern border. Sr. Carmona Benavides also reported that the mercenaries found in the border area were being paid by the *contra* group based in San José. (Ann. H, Attachments 1, 2. See also Ann. I, Attachment 1.) Costa Rican Rural Guard officials not only tolerated the *contras'* presence, but helped them. For example, on many occasions, Rural Guard officers assisted bands of *contras* in avoiding detection and capture by other authorities. (Ann. H, Attachments 3, 4.)

34. On 15 April 1982 at a press conference in San José, Edén Pastora called for the overthrow of the Nicaraguan Government and announced the formation of the Sandino Revolutionary Front (FRS) for that purpose. (Ann. F, Attachment 6 (Report of the United States Defense Intelligence Agency, 16 July 1982, p. 23); see also Ann. H, Attachments 7, 8.) Thereafter, Pastora and his followers operated freely in Costa Rican territory. Pastora himself called over Costa Rican radio for armed struggle against Nicaragua, and, according to a statement in June by one of his aides, "more than 1,000 men have been trained in Pastora's camps" in Costa Rica, and "another 3,000 support him in other ways". The aide claimed that the camps were scattered throughout Costa Rica, each housing between 180 and 300 members, who received military training and political indoctrination. (Ann. I, Attachment 2.)

35. The Costa Rican Government took no action against Pastora until May, citing his rights under the principle of "freedom of expression". (Ann. H, Attachment 9.) In May, several machine-guns and pistols were confiscated from Pastora's bodyguards in San José, but the bodyguards were freed soon thereafter. (Ann. H, Attachments 13 and 14.) Pastora himself was expelled from Costa Rica on 22 May. (Ann. H, Attachment 15.) However, his re-entry into Costa Rica was later authorized, and his activities allowed to resume. This was to become a recurrent pattern; for example, on 5 October 1982, he was captured with a large quantity of arms, but was immediately set free and given back his arms, by order of President Monge. (Ann. H, Attachment 22.)[1]

36. Meanwhile, on 7 April a *contra* group attacked the Nicaraguan customs post at Peñas Blancas from Costa Rican territory. Responsibility for the attack was claimed by *contra* leaders Fernando and Edmundo Chamorro. (Ann. H, Attachments 5, 6.) This attack was only the first of numerous assaults by Costa Rica-based *contras* on Peñas Blancas, site of the major border post where the Pan American Highway crosses between Nicaragua and Costa Rica.

37. On 10 May an airliner of the Nicaraguan airline Aeronica was hijacked and flown to Costa Rica. Nicaragua's application for the extradition of the hijacker was denied by Costa Rica. (Ann. A, Attachment 2 (Diplomatic Note of Nicaragua); Ann. H, Attachment 12; Ann. G, Attachment 3.)

38. By June, at least 2,000 *contras* were known to be established in Costa Rica, according to files of the Costa Rican National Security Agency. (Ann. H, Attachment 16.) That same month an alliance was announced between Pastora

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[1] Pastora entered Costa Rica in April 1982 and was expelled on 22 May 1982; his re-entry was authorized on 11 September 1982; he was arrested and freed on 4 October 1982; expelled in April 1983; entered Costa Rica with 192 men at the end of January 1984; expelled 1 June 1984; and was granted asylum in Costa Rica in June 1986. (Ann. H, Attachments 14, 15, 20, 21, 22, 30, 39, 61, 62.)

and Alfonso Robelo, leader of a San José-based organization called the Nicaraguan Democratic Movement (MDN). (Ann. H, Attachment 17.) Paid political advertisements placed by Robelo and the MDN stated in part, "The moment has arrived for open struggle . . .". (Ann. E, Attachment 2, Nos. 1, 2.)

39. On 24 July FDN leader José Francisco Cardenal held a press conference in San José, at which he claimed responsibility for recent attacks against Nicaragua and declared that military means were necessary to establish a new Government in Nicaragua. (Ann. A, Attachment 16 (Diplomatic Note of Nicaragua, 4 August 1982); Ann. H, Attachments 18, 19.)

40. On 25 September a new alliance among the several Costa Rican-based *contra* groups was announced in San José, calling itself the Democratic Revolutionary Alliance (Alianza Revolucionaria Democratica), or ARDE. Among those included in the alliance were Eden Pastora (FRS), Alfonso Robelo (MDN), Fernando Chamorro (UDN/FARN), and Brooklyn Rivera, head of an organization of Miskito, Sumo and Rama Indians called Misurasata. (Ann. E, Attachment 2, Nos. 4, 5.)

41. On 2 November *contras* Fernando Chamorro and Juan José Zavala were detained in Naranjo, Guanacaste in northern Costa Rica, with a cargo of arms, maps, parachutes, aerial navigation charts and other equipment. (Ann. H, Attachments 25, 26.) The two were freed on the same day. On 4 November the weapons and supplies were returned to them. (Ann. H, Attachments 27, 28.) The mayor of Naranjo asserted that the arms were returned because the Ministry of Public Security had issued permits to Chamorro and Zavala to carry an unlimited quantity of weapons of any type. (*Id.*, see also Ann. I, Attachment 3.) The permits had been renewed on 13 October 1982, by the Arms and Explosives Controls Department of the Ministry of Public Security. (Ann. H, Attachment 28.)

42. The mobilization of *contra* groups in northern Costa Rica continued through the end of 1982 under the full view of Costa Rican authorities, who did little or nothing to stop it. (Ann. H, Attachment 23.) For example, on 1 December a group of *contras* attacked the Nicaraguan border village of Cardenas, supported by an aircraft that dropped flares over Cardenas near Nicaraguan defensive positions. Both the attackers and the aircraft returned unhindered to Costa Rican territory. This occurred in an area 5 kilometers from the frontier and near the Pan American Highway, where there are several Costa Rican observation posts. The attack lasted nearly five hours and could not have escaped the attention of the Costa Rican authorities, who took no action. Moreover, it occurred only one day after a meeting, held under the auspices of the Mixed Commission, between Nicaragua's Vice Minister of the Interior and Costa Rica's Vice Minister of Public Security, the purpose of which was to prevent the occurrence of such incidents. (Ann. A, Attachment 18 (Diplomatic Note of Nicaragua).) Two weeks later, a Member of the Costa Rican National Assembly stated that the attack on Cardenas was staged from Costa Rica and specifically from bases known to the Costa Rican Government:

> "We have been able to confirm that the light airplane which overflew the village of Cardenas during the attack perpetrated against it took off from Playa Blanca in the jurisdiction of Hacienda El Murcielago, Costa Rican territory.
>
> The Government knows that there and in a nearby estate there is not one small airplane, but two, plus a camouflaged helicopter.
>
> The group of counter-revolutionaries who attacked the town (Cardenas) crossed the border having departed from Chapernon and Peña Lonja, in Costa Rica territory a few kilometers from the frontier.

> New acts of aggression are being prepared in encampments on several estates on the border, one of which belongs to Hector García, another in Monte Plata belonging to a widow named Medina, and also on estates of Rigoberto Gallegus and Ramiro Oregneda." (Ann. H, Attachment 64.)

43. At the same time, *contra* organizations continued, with impunity, to make San José their headquarters for making public appeals in support of their military and political campaign agaisnt Nicaragua. See, e.g., the numerous paid political advertisements appearing in San José newspapers in December 1982. (Ann. E, Attachment 2, Nos. 7-15.)

1983

44. *Contra* activity in Costa Rica continued and expanded in 1983, and the evidence mounted that Costa Rican authorities principally the Rural Guard, were openly assisting the mercenary forces. (Ann. I, Attachments 4, 8.) Throughout 1983 and into 1984, Pastora's operations — all on Costa Rican soil — continued unabated. (Ann. I, Attachment 5.) While his activities were shut down briefly by Costa Rican authorities from time to time, on each occasion they quickly resumed. (Ann. I, Attachment 8.)

45. The public appeals of Pastora and other *contra* leaders for armed struggle against Nicaragua likewise continued to emanate from Costa Rica. For example, on 7 January 1983 a press conference was held in San José in which Alfonso Robelo, Brooklyn Rivera, Edén Pastora and Francisco Fiallos, all members of ARDE, called for the overthrow of the Nicaraguan Government. (Ann. A, Attachment 22 (Diplomatic Note of Nicaragua).) On 9 February 1983, at a press conference at the Hotel Ambassador in San José, *contra* leader Adolfo Calero asserted that armed struggle against the Government of Nicaragua was growing daily. "It is a struggle which the people will launch against the comandantes", Calero asserted. (Ann. H, Attachment 29.) Further, on 5 and 7 January 1983, Pastora interfered with broadcasts on a Nicaraguan television channel to call for armed struggle against the Government of Nicaragua; the interfering broadcasts were traced to the Hacienda El Amo, Costa Rica, the location of one of Pastora's military camps. (Ann. A, Attachment 22 (Diplomatic Note of Nicaragua).)

46. Moreover, even when clandestine broadcasts by Pastora and others were investigated, the perpetrators were allowed to continue their activities. On or about 23 February 1983, in the course of an investigation of clandestine radio broadcasts, Major Mario Jara Castro of the Costa Rican Rural Guard conducted a search of the "Quinta Heroica" estate in the Department of San José. The estate belonged to a Dutch national, one of whose local representatives was a Nicaraguan, Carlos Maturana Marques, a member of ARDE. Major Jara's men discovered and confiscated a pick-up truck which contained a mobile transmitter. However, on 23 February Vice Minister of Governance Enrique Chacon telephoned Major Jara and instructed him to hand over the transmitter and truck to Maturana Marques. Major Jara did so, in the presence of Col. José Benito Zeledón González, Director General of the Rural Guard. (Ann. A, Attachment 109 (Diplomatic Note of Nicaragua).)

47. *Contra* attacks from Costa Rica against Nicaraguan vessels, border posts, and citizens continued throughout April and May 1983. A partial listing of such attacks includes the following:

> On 10 April a *contra* group attacked and seized a launch belonging to the Nicaraguan Ministry of Transport near Tasbapauni, Nicaragua. The

passengers and crew were kidnapped and taken to Barra del Colorado and thence to Puerto Limon, Costa Rica. One of the kidnap victims was wounded and was being treated in a hospital in Limon. (Ann. A, Attachment 26 (Diplomatic Note of Nicaragua).)

On 15 April a *contra* group coming from Costa Rica attacked the border post of Fatima de Sarapiqui, in the Department of Río San Juan. (Ann. A, Attachment 28 (Diplomatic Note of Nicaragua).)

On 1-4 May *contras* repeatedly attacked, from Costa Rican territory, Nicaraguans who were guarding the ship *Bremen* at Machuca, El Castillo, Rio San Juan. (Ann. C, Attachment 1; see Ann. A, Attachment 48 (Diplomatic Note of Nicaragua).)

On 2 May two Nicaraguans were killed when a *contra* group coming from Costa Rica attacked the border post of La Esperanza with mortars and rifle fire. (Ann. A, Attachment 38 (Diplomatic Note of Nicaragua).)

On 3 May 50 *contras* attacked the border post of Papaturro. After being repelled by Nicaraguan troops, they retreated to Costa Rica. Among the attackers killed was a Costa Rican national and former Major in the Rural Guard, Francisco Rodríguez. (Ann. A, Attachment 47 (Diplomatic Note of Nicaragua).)

On 5 May two Nicaraguans were wounded at Boca de Sabalos, Río San Juan, when they were ambushed by mercenaries. The attackers retreated to Costa Rican territory. (Ann. C, Attachment 1.)

On 5 May *contras* attacked, from Costa Rican territory, a civilian boat which was carrying provisions to one of the towns near San Juan del Norte. They kidnapped four Nicaraguans, including a ten-year-old boy, and took them to Costa Rica. (Ann. A, Attachment 44 (Diplomatic Note of Nicaragua).)

On 10 May, an aircraft coming from Costa Rica overflew the sector of Barra Río Maiz, where it dropped packages containing supplies for *contra* groups. The aircraft then returned in the direction of Costa Rica. (Ann. C, Attachment 1.)

On 25 May, a boat carrying three West German journalists and several members of the Nicaraguan border patrol was attacked by *contras* from the Costa Rican side of the San Juan River near El Castillo. Two Nicaraguans were killed in the attack; four Nicaraguans and one of the journalists were wounded. The attackers kidnapped all three of the journalists and took them to Costa Rica. (Ann. C, Attachment 1; Ann. C, Attachment 6; see also Ann. A, Attachment 4 (Diplomatic Note of Nicaragua).)

48. During this period, Costa Rican officers admitted that the *contras* operating on their territory received official Costa Rican support. In May, Lt. Col. Nestor Mora Rodríguez, a local Rural Guard commander in Los Chiles, admitted his support for the *contra* forces, and acknowledged that he had personally helped put Nicaraguan refugees in contact with *contra* organizers in Costa Rica to facilitate their recruitment into the *contra* forces. And Col. Gilberto Orozco, regional head of the Rural Guard for the province including Los Chiles, admitted that Costa Ricans gave the *contras* logistical support, including food and shelter. (See Ann. I, Attachment 4.)

49. On 24 May 1983, accused hijacker Miguel Bolaños Hunter departed from Costa Rica after having been freed the previous day from Costa Rican custody on the orders of the Trial Court of Liberia, Costa Rica. Hunter, a United States citizen, had been accused of hijacking an airplane belonging to "Alas", a private

Nicaraguan company, and forcing the pilot to fly to Costa Rica. He was released from Costa Rican custody without ever being tried for the hijacking. (See Memorandum of 8 August 1983, from Costa Rican Major Rodolfo Jiménez Montero, Deputy Director of Intelligence and Security, to Col. Johnny Campos, Vice-Minister of Public Security, on "the freeing and departure from our country of an accused hijacker", and Costa Rican court records documenting Bolaños Hunter's detention and release, attached to Annex A, Attachment 109 (Diplomatic Note of Nicaragua).)

50. *Contra* attacks from Costa Rican territory continued throughout the remainder of 1983. A partial listing of attacks in June and July includes the following:

> Between 28 June and 2 July 1983, a group of *contras* infiltrated Nicaraguan territory from Costa Rica, attacking the border post of San Juan del Norte with heavy machine guns, mortars, rockets and rifle fire. One Nicaraguan was killed and two were wounded. (Ann. C, Attachment 1; Ann. A, Attachment 53 (Diplomatic Note of Nicaragua).)
>
> On 6 July *contras* armed with rifles kidnapped Nicaraguan citizen David Abud near the border post of El Papaturro and took him to Costa Rica. (Ann. C, Attachment 1.)
>
> On 7 July one Nicaraguan was killed and another wounded in the El Toro sector, Río San Juan, when their patrol was ambushed by *contras*. The attackers retreated to Costa Rica. (Ann. C, Attachment 1.)
>
> On 8 July *contras* ambushed a border patrol near San Juan del Norte, killing the officer in charge of the border post there. After the attack the *contras* retreated toward Costa Rican territory. (Ann. C, Attachment 1.)
>
> On 10 July *contras* on four boats armed with M-50 machine guns hijacked a Nicaraguan fishing boat, *Langostera 160*, and took it into Costa Rica. (Ann. C, Attachment 1.)
>
> On 19 July the border post of El Papaturro was attacked by 20 to 30 *contras* who had infiltrated from Costa Rica. One Nicaraguan was wounded. (Ann. C, Attachment 1.)
>
> On 23 July one Nicaraguan was wounded in a battle at Comarca Pavon II, near San Carlos, between a Nicaraguan border patrol unit and *contras* who had crossed from Costa Rican territory. After the battle, the *contras* retreated toward Costa Rica. (Ann. C, Attachment 1.)

51. On 31 July 1983, the Nicaraguan customs post at Peñas Blancas was hit by light arms fire from Costa Rican territory for about one-half hour, and the Nicaraguan Army returned the fire. Costa Rican military reports dated 3 and 5 August 1983 confirm that the attack began "from Costa Rican territory". (Ann. D, Attachment 1 (Letter from the officer in charge of the Northern Command, Lt. Col. Rodrigo Rivera Saborio, to Costa Rican Minister of Public Security, Angel Edmundo Solano Calderón, based on information provided by Sub-lieutenant Sigifredo Medrano, officer in command of the Costa Rican post at Peñas Blancas).) The report of Sub-lieutenant Medrano, officer in charge, further stated:

> "From the moment when I was first assigned to the post at Peñas Blancas on June 5, 1983, I have seen activities taking place here along the border which I do not believe to be proper. Persons come and go without the documents which this department is supposed to require for entry into and departure from the country, for example, passport, visa, etc." (Ann. D, Attachment 4.)

52. Two additional official reports filed later in August, by Lt. Col. Mario Araya, head of the Special Supervisory Unit, to Johnny Campos, Vice Minister of Public Security, confirmed that the *contras* were operating throughout the area without restriction. Following a 24 August search of the Medio Queso Zone, Lt. Col. Araya, who commanded the search group, reported to Vice Minister Campos on 29 August that:

> "the subversives [i.e., *contras*] travel freely through the entire zone, without encountering any opposition from the respective authorities. We recommend at least three fixed positions by the Civil Guard in the following locations: Cachito, La Trocha and Boca de Pocosol, as well as intensive patrolling of the entire zone. We recommend the closure of the airport in the La Chalupa estate or the establishment of a monitoring post there." (Ann. D, Attachment 6.)

And in a report to Vice Minister Campos on searches conducted a few days later in Guanacaste, Lt. Col. Araya concluded:

> ". . . the immigration controls are deficient and any foreigner is given legal documentation in Liberia. . . . We have detected that there are 'safe houses' in La Cruz which are used, among other things, to recruit combatants and send them to Honduras. The same is true of Liberia and Canas. We recommend an investigation and 'clean-up' of those towns by National Security.
>
> *We cannot disregard the assistance which the counter-revolutionary and non-counter-revolutionary elements have received from persons who form part of this Government* . . ." (Ann. D, Attachment 7 (emphasis added).)

53. Still another report, from the Costa Rican Director of Intelligence and Security to Minister of Public Security Angel Edmundo Solano Calderón, dated 30 August reported that:

> "In Los Chiles, there is much activity by both sides; according to rumors, it is feared that there will be an act of terrorism near Upala. There is talk of movements by members of the counter-revolution, and *the Commander of the Civil Guard does absolutely nothing*. . . ." (Ann. D, Attachment 5 (emphasis added).)

54. Despite the fact that top officials of the Costa Rican Government were thus repeatedly alerted, by their own subordinates, to the *contras'* operations and the active complicity of the local authorities, the *contras'* activities in Costa Rica continued without interference. For example:

> On 28 August an airplane flying from Costa Rica carried supplies to a *contra* unit located on the banks of the Santa Cruz River, La Azucena, Dept. of Río San Juan. (Ann. C, Attachment 1.)
>
> On 29 August speedboats from Costa Rica brought supplies to *contras* at Barra Río Maiz. (Ann. C, Attachment 1.)
>
> On 3 September one Nicaraguan was killed and another wounded in an ambush by *contras* near Cardenas. The *contras* kidnapped the wounded man and took him across the border into Costa Rica. (Ann. C, Attachment 1.)
>
> On 8 September two ARDE aircraft proceeding from Costa Rican airspace entered Nicaragua. One attacked the Augusto C. Sandino International Airport in Managua, and was shot down. The other returned in the direction of Costa Rica. (Ann. A, Attachment 58 (Diplomatic Note of Nicaragua; see also Ann. H, Attachments 31, 33; Ann. I, Attachment 6).)

CIA Station Chief Fernandez also confirmed that Pastora's forces were responsible for this attack. (Ann. F, Attachment 3 (Testimony of Mr. Fernandez at p. 160).)

On 9 September a Cessna 185 airplane bearing the registration TI AGN was shot down in the Bolillo sector near El Castillo while on a mission to carry supplies to *contra* units. (Ann. C, Attachment 1.)

55. On 13 September 1983, a San José newspaper printed a full-page statement by Edén Pastora filled with "promises" of military actions against Nicaragua and threats to kill Nicaraguan leaders. "We are going to keep on bombing [Nicaraguan] military positions", the statement said. "We are stronger than ever . . . and you (Members of the Nicaraguan Government) will be killed." (Ann. H, Attachment 32.) Ten days later, an airplane flying from Costa Rica used rockets to attack the "Nicarao" electric plant and the "Induquinisa" factory in Nicaragua. In a communiqué issued by ARDE military headquarters in San José, Edén Pastora claimed responsibility for the attack. (Ann. H, Attachment 34.) The Government of Nicaragua vigorously protested the use of Costa Rican territory for ARDE's continuing military and propaganda campaign against it. (Ann. A, Attachment 63 (Diplomatic Note of Nicaragua).)

56. On 28 September beginning at 5.10 a.m., an ARDE force of approximately 80 to 100 *contras* invaded Nicaragua from Costa Rica, mounting simultaneous mortar and grenade attacks against the customs office at Peñas Blancas and the towns of Cardenas and La Boca del Sapoa. The attackers withdrew to positions one-half kilometer from the border, in the vicinity of the Costa Rican customs facilities, where they had to have been observed by Costa Rican authorities. From there, they used mortars and other heavy weapons to effect the almost total destruction of the Nicaraguan customs post at Peñas Blancas. Subsequently, attacks resumed against the Nicaraguan post. This time the *contras* fired mortars and other weapons from emplacements in the Costa Rican customs facilities themselves. Two aircraft also invaded Nicaraguan airspace from Costa Rica, bombing Nicaraguan positions in the El Naranjo sector and retreating into Costa Rican territory. Three Nicaraguans were killed and nine were wounded in these attacks. (Ann. A, Attachments 67, 68 (Diplomatic Notes of Nicaragua); Ann. H, Attachments 35, 36.) Costa Rican Minister of Public Security, Angel Edmundo Solano, subsequently confirmed that "counterrevolutionaries used Costa Rican territory to attack Nicaragua" in the 28 September attack on Peñas Blancas. (Ann. I, Attachment 7.)

57. In response to Nicaraguan protests over the Peñas Blancas assault, Costa Rican Foreign Minister Fernando Volio Jiménez denied that the attack on Peñas Blancas was launched from Costa Rican territory. (Ann. A, Attachment 71 (Diplomatic Note of Costa Rica).) However, in the same note, Volio admitted that Costa Rican forces were in the area where the attack occurred, but that, rather than impede the *contras*, they withdrew.

> "The Costa Rican authorities (ten Civil Guards and nine Rural Guards), in accordance with orders from their superiors, pulled back from the border post at the outbreak of the battle, because of [their] proximity to the location of the conflict", Volio wrote. *(Id.)*

Major Juan Rafael Guerara, second-in-command of the Costa Rican Northern Command, told visiting members of the National Assembly that the Rural Guard had given advance warning to the Civil Guard at Peñas Blancas that a *contra* attack would take place there. The Assembly members concluded that ARDE forces had attacked Nicaragua from Costa Rican territory. (Ann. A, Attachments 67, 68 (Diplomatic Notes of Nicaragua); Attachments 69, 71 (Diplomatic Notes of Costa Rica). See also Ann. H, Attachments 35, 36.)

58. Additional attacks to the end of 1983 included the following.

On 2 October *contra* commandos operating from Costa Rica used speedboats to reach the port of Benjamín Zeledón, where they destroyed two large fuel tanks which supplied the entire Atlantic Coast region of Nicaragua. One of the tanks had a capacity of 308,448 gallons of diesel fuel and the other a capacity of 71,253 gallons of gasoline. The attack paralyzed economic activity in the Department of Zelaya, Nicaragua, and seriously affected the town of Puerto Cabezas. (Ann. A, Attachment 74 (Diplomatic Note of Nicaragua).)

On 5 October a group of 40 *contras* kidnapped a Nicaraguan civilian from Aguas Claras, Río San Juan, and took him to Costa Rica. (Ann. C, Attachment 1.)

On 7 October the border post of El Naranjo was attacked from Costa Rica with mortars. ((41.42); Ann. A, Attachment 76 (Diplomatic Note of Nicaragua).)

On 18 October *contras* coming from Costa Rica kidnapped 4 workers from the La Flor farm near Peñas Blancas, taking them toward Costa Rican territory. (Ann. C, Attachment 1.)

On 5 November, *contras* based in Costa Rican territory attacked the border post of Pueblo Nuevo. (Ann. A, Attachment 82.)

On 6 November, approximately 60 *contras* coming from Costa Rica attacked Orosi, Nicaragua, with rifles and mortars. One Nicaraguan was wounded. (Ann. A, Attachment 84.)

On 18 November the town of Cardenas was attacked with mortars from Costa Rican territory. Three civilians were wounded. On the same day, a concentration of counter-revolutionaries was reported in the vicinity of Peñas Blancas. (Ann. A, Attachment 85 (Diplomatic Note of Nicaragua).)

On 19 December *contras* crossed over from Costa Rica, burned the Santa Ana farm near the Colon border post, and kidnapped the family living there. (Ann. C, Attachment 1.)

1984

59. During 1984, at least 16 *contra* base camps were in active operation in Costa Rica. The precise locations of these camps are set out in Annex C, Attachments 3, 4; see also Annex A, Attachment 109 (Diplomatic Note of Nicaragua). Several of these camps had communications facilities, as well as landing strips. In addition, numerous *contra* collaborators operated in various capacities throughout Costa Rica. They are specifically identified in Ann. C, Attachment 3; Annex A, Attachment 109 (Diplomatic Note of Nicaragua).

60. In all, at least nine airstrips inside Costa Rica were being used by the *contras* in 1984: El Murciélago, Liano Grande de Liberia, Upala, Medio Queso, Los Chiles, Boca de San Carlos, Barra del Colorado, Barra del Tortuguero, and Guapiles. (Ann. C, Attachment 5, Table 2.) An American mercenary named Bruce Jones who enlisted in Pastora's campaign and operated with Pastora's forces from mid-1982 to February 1985 has stated that he was aware of approximately 100 deliveries of supplies for the *contras* — everything from boots to anti-aircraft guns — provided by CIA-sponsored aircraft landing at Costa Rican farms between May 1982 and May 1984. (Ann. I, Attachment 14.) Members of

ARDE also openly used the Tobias Bolaños Airport in Pavas, and the Las Loras Airport in Puntarenas, for diverse military-related activities. ARDE leader Fernando "El Negro" Chamorro was found at Tobias Bolaños Airport on 3 March 1984, before one of his periodic expulsions from Costa Rica. (Ann. H, Attachment 40.)

61. One site of landing strips in northern Costa Rica used by aircraft making deliveries to the *contras* was the farm of a United States-born, naturalized Costa Rican citizen named John Hull. Hull, who has lived in Costa Rica for 20 years, owns the "La Chalupas" farm near the Nicaraguan border. Hull has admitted helping the *contras* operating in northern Costa Rica by allowing their supply flights to land on airstrips on his property. He has also admitted directing *contra* supply flights to landing sites on neighboring properties; feeding and housing *contra* forces after they have sustained military defeats; providing intelligence to the *contras*; and helping to plan *contra* attacks, including ARDE's 8 September 1983 air attack on Sandino International Airport in Managua. (See, e.g., Ann. I, Attachments 65, 57, 43, 40.) In addition, CIA Station Chief Fernandez has testified that "Hull was very active in supporting the resistance people [i.e., *contras*]", by allowing his property in northern Costa Rica to be used for the delivery of supplies. (Ann. F, Attachment 3 (Testimony of Mr. Fernandez, pp. 157, 164).) Two former United States Ambassadors to Costa Rica, Curtin Windsor and Francis McNeil, have also confirmed that Hull's farm has been used regularly by *contras* on the "Southern Front". (Ann. I, Attachment 64.)

62. During 1984, *contra* organizations headquartered in San José continued to issue appeals for military action against Nicaragua. On 9 January ARDE published in San José a paid advertisement containing its manifesto, which "supports a political and military struggle to eradicate the Marxist-Leninist totalitarianism of the FSLN, to expel the interventionist forces and rescue the Nicaraguan revolution". (Ann. E, Attachment 2, No. 16.)

63. Specific attacks waged by the *contras* against Nicaragua from Costa Rican territory in early 1984 included the following:

> On 11 January a Nicaraguan patrol fought with a group of *contras* east of El Castillo as they attempted to infiltrate into Nicaraguan territory. (Ann. C, Attachment 3.)
>
> On 21 January a *contra* group which penetrated from Costa Rica in the sector of Loma Quemada, Río San Juan, kidnapped 14 Nicaraguans, among them six surveyors and three campesinos. The kidnap victims were taken to Costa Rican territory. One managed to escape. (Ann. A, Attachment 94 (Diplomatic Note of Nicaragua).)
>
> On 23 January the town of El Castillo was attacked with mortars by *contras* based in Costa Rica. (Ann. C, Attachment 3.)
>
> On 25 January one Nicaraguan was killed and two were wounded by *contras* in a battle at Portugal, Department of Rivas. The *contras* retreated in the direction of Costa Rican territory. (Ann. C, Attachment 1.)
>
> On 29 January *contras* attacked Comarca La Concordia from Costa Rican territory. (Ann. C, Attachment 3.)

64. In February, a Civil Guard official investigation determined that "from Costa Rican territory, counter-revolutionary activists with emplacements of machine-guns attacked Sandinista positions located very close to the border on Nicaraguan soil". (Ann. D, Attachment 8 (Report from Col. Oscar Vidal Quesada to Minister of Public Security Solano); Attachments 97, 99 (Diplomatic Notes of Nicaragua); cf. Ann. A, Attachment 98 (Diplomatic Note of Costa Rica).)

65. Costa Rican authorities not only knew of such activities, but aided and abetted them. For example, on 28 January 1984, Edén Pastora entered Costa Rica with 192 men, seeking refuge for them and for some 2,000 others who were to follow. (Ann. H, Attachment 37.) Pastora's entry was contrary to stated Costa Rican policy at the time. (Ann. H, Attachments 37, 38.) Nevertheless, the regional commander of the Rural Guard, Col. Gilberto Orozco, not only permitted Pastora to enter the country, but met with him on Costa Rican soil. (Ann. H, Attachment 37.) The co-ordinator of the State Security Council, Armando Arauz, announced that the Council had ordered Col. Orozco to be fired for allowing Pastora to enter Costa Rica. *(Id.)*

66. Col. Orozco was still regional Rural Guard commander two months later, however, when he was reported to have visited the site where an ARDE supply plane had crashed on 23 or 24 March 1984. (Ann. H, Attachment 43. See also Ann. H, Attachment 39.) The plane was loaded with 500,000 rounds of ammunition and hundreds of articles of military clothing. It crashed near the town of Chamorrito, Costa Rica, 20 kilometers from the Nicaraguan border. Lic. Mainor Calvo, director of Costa Rica's Bureau of Judicial Investigation, later reported that the plane was carrying supplies for ARDE. According to Calvo, the supplies were to be dropped by parachute on an ARDE camp inside Nicaragua. (See Ann. H, Attachment 49.) Col. Orozco's visit to the area took place three days after the crash and some ten days before Costa Rican officials say that they learned about the crash. (Ann. H, Attachments 41, 42, 43, 49.) A member of the National Assembly asserted that Col. Orozco had participated in a cover-up of the incident. (Ann. H, Attachment 44.)

67. Additional attacks in early 1984 included these:

> On 9 February a group of *contras* attacked a Nicaraguan army patrol from Cerro Las Mercedes, Costa Rica, with 81 mm mortars. (Ann. C, Attachment 3.)
>
> On 18 February a group of *contras* coming from Costa Rica attacked Hill 169, near the border post of El Naranjo. (Ann. C, Attachment 3.)
>
> On 20 February two boats coming from Costa Rica attacked the border post of San Juan del Norte with machine-gun fire. (Ann. C, Attachment 3.)
>
> On 22 February a *contra* group coming from Conventillos in Costa Rica again attacked the border post at Hill 169, 1 km south of the El Naranjo border post. (Ann. C, Attachment 3.)
>
> On 29 February a *contra* group coming from Costa Rican territory attacked the border post of San Juan del Norte. (Ann. C, Attachment 3.)
>
> On 8 March two "piranha" speedboats coming from Costa Rica attacked the Port of San Juan del Sur. (Ann. C, Attachment 3.)
>
> On 12 March 20 *contras* attacked the town of Los Chiles, near San Carlos. (Ann. C, Attachment 3.)
>
> On 13 March one Nicaraguan was wounded when *contras* attacked the border post of Peñas Blancas from Costa Rican territory. Some of the shots were fired from the Costa Rican command post there. (Ann. C, Attachment 1.)
>
> On 13 March a *contra* group located 200 meters from Peñas Blancas, in Costa Rican territory, attacked the Nicaraguan border post there. (Ann. C, Attachment 3.)
>
> On 15 March a group of 30 *contras* fought with Nicaraguan troops as they attempted to infiltrate into Nicaragua from the sector opposite the border post of Colon. (Ann. C, Attachment 3.)

On 17 March 15 *contras* entered Nicaragua from Costa Rica and engaged in combat with Nicaraguan troops at the border post of El Papaturro. On their retreat, the *contras* were supported by firing from rocket launchers and rifles of the Costa Rican Rural Guard. (Ann. C, Attachment 1.)

On 17 March a *contra* group coming from Costa Rican territory attacked the border post of Peñas Blancas. (Ann. C, Attachment 3.)

On 21 March a patrol of the Nicaraguan army was ambushed near the border post of La Noca. One Nicaraguan was wounded. (Ann. C, Attachment 3.)

On 23 March a *contra* group coming from the sector of Cabalceta, Costa Rica, again attacked the border post of Peñas Blancas. (Ann. C, Attachment 3.)

On 30 March a *contra* group coming from Costa Rican territory attacked the border post of Cardenas. (Ann. C, Attachment 3.)

On 5 April a Nicaraguan army patrol was ambushed near the border post of La Noca, near San Carlos; Nicaraguan troops were also ambushed by a group of *contras* near the border post of El Papaturro, San Carlos. (Ann. C, Attachment 3.)

68. Beginning on 6 April 1984, a group of approximately 500 *contras* coming from Costa Rica attacked the border post of San Juan del Norte. On 12 April the town was taken by ARDE forces after a series of mortar and machine-gun attacks. During the assault, the attacking *contras* were supplied with provisions from boats based in Costa Rica. This resupply operation was known to and authorized by the head of the Rural Guard for the Atlantic zone. During the brief period when the town was occupied, journalists were transported to San Juan del Norte from San José with the co-operation of Costa Rican officials, and an ARDE spokesman in San José provided extensive information on the military operation. (Ann. A, Attachments 101, 102, 104, 109 (Diplomatic Notes of Nicaragua 10 April 1984, 11 April 1984, 16 April 1984, 28 April 1984); Ann. C, Attachment 3; see also Ann. H, Attachments 45, 46.)

69. Additional attacks from Costa Rica through the end of 1984 included these:

Between 26 and 30 April a major attack was carried out by 500 *contras* from Costa Rican territory against Nicaraguan positions in the El Castillo zone, Department of Río San Juan. After the attack the *contras* returned to Costa Rican territory. One Nicaraguan was killed and five were wounded in this series of attacks. (Ann. A, Attachments 110, 111. (Diplomatic Notes of Nicaragua).)

On 11 April a group of approximately 30 *contras* entered Nicaragua from Costa Rica, attacked the border post of El Gobernador, Río San Juan, with mortars and machine guns, and then withdrew to Costa Rican territory. (Ann. C, Attachment 3.)

On 24 April a group of 10 *contras* ambushed Nicaraguan troops who were traveling by boat in the El Jobito sector, 40 kilometers south-east of San Carlos, damaging the boat. (Ann. C, Attachment 3.)

On 27 April a group of *contras* coming from Costa Rican territory fought with a Nicaraguan patrol on the Gavilán Hill, 5 kilometers south-west of El Castillo. One Nicaraguan was killed and six were wounded. (Ann. C, Attachment 3.)

On 28 April a group of 20 to 30 *contras* ambushed a Nicaraguan army vessel headed for the border post of Orosi, north-east of Cardenas. One Nicaraguan was killed and another wounded. (Ann. C, Attachment 3.)

On 29 April a group of *contras* coming from Costa Rican territory attacked the town of Cardenas with 81 mm mortar fire. (Ann. C, Attachment 3.)

On 30 April a group of approximately 300 *contras* fought with Nicaraguan troops on Gavilán Hill. Seven Nicaraguans were killed and 12 wounded. The *contras* withdrew into Costa Rica. (Ann. C, Attachment 3.)

On 1 May 150 ARDE combatants fought with Nicaraguan troops in Quebrada La Flor, near El Castillo, killing four Nicaraguans and wounding six. The *contras* withdrew in the direction of Las Alturas in Costa Rican territory. (Ann. C, Attachment 1.)

On 7 May a group of 80 to 100 *contras* attacked the border post of Palo de Arco, killing four Nicaraguan civilians, including two children, and wounding four others. The El Cachito post of the Costa Rican Rural Guard is located 500 meters from the place of the attack. After the attack, the *contras* withdrew to Costa Rica, where at least 26 were treated for their wounds in Costa Rican hospitals. (Ann. H, Attachment 48; Ann. A, Attachment 116 (Diplomatic Note of Nicaragua); Ann. C, Attachment 3.)

70. On 30 May 1984, Edén Pastora held a press conference at La Penca, Costa Rica, during which a bomb exploded, injuring Pastora and others and killing eight people. ARDE had organized the ill-fated press conference from San José — the base for numerous foreign correspondents covering the escalating *contra* operations in Costa Rica — and transported the journalists to La Penca. (Ann. I, Attachments 9, 10.) After the explosion at La Penca, Edén Pastora was transported to the Clinica Biblica in San José for treatment of his injuries. Pastora was not arrested by the Costa Rican authorities, despite a deportation order of 29 March 1983, which still barred his entry into the country. Pastora announced in San José that he would resume his "war of liberation" within a month. (Ann. H, Attachments 51, 53, 54, 55, 56.)

71. Two lawsuits have been brought as a result of the bombing at La Penca. One was a libel action brought in the First Penal Court of San José by John Hull against Costa Rican-based journalists Tony Avirgan and Martha Honey, for statements they made linking Hull with the CIA and an alleged conspiracy to kill Pastora at La Penca. (After two days of testimony in May 1986, Hull's complaint was dismissed, and his appeals were unsuccessful.) (See Ann. G, Attachment 2.) The other is a civil action brought by Avirgan (who was injured at the La Penca bombing) and Honey against Hull and 29 others, alleging a conspiracy in violation of United States laws. It is pending in a United States federal court in Florida.

72. The Costa Rican Government could hardly have been unaware of *contra* activities within its territory during this period. Indeed, on 6 September 1984, Ricardo Rodríguez Solórzano, a Member of the Costa Rican Legislative Assembly, wrote to President Monge, with a copy to Benjamín Piza, Minister of Public Security, providing extensive details on *contra* operations, bases and supplies in northern Costa Rica, and describing growing popular opposition to the *contras'* presence. His letter, and the transcript of a press conference he held on "The Presence of Somocista Troops in Costa Rica", were reprinted in a paid full-page announcement in *La Nación*. (Ann. H, Attachment 57.) In this announcement, Deputy Rodríguez provided the precise locations of recent *contra* activities in northern Costa Rica that had been reported to him by "distinguished businessmen from Guanacaste". In his letter to President Monge, he requested that the Government put an end to these activities, which he described as the "mobilization of men in the FDN, who are armed and in our national

territory in order to harass the government and territory of Nicaragua". (Ann. H, Attachment 57.)

73. On 18 December in the Trial Court of San Carlos, Alajuela, Costa Rica, charges were filed against members of ARDE for the murder of a Costa Rican citizen in June 1984. Witnesses testified that ARDE was operating from Costa Rican bases at the time. Fausto Rojas Cordero, head of the Branch Office of the Bureau of Judicial Investigation for the canton of San Carlos, testified that "the 'military zone' on Costa Rican territory where ARDE operated [was] in the border sector of Los Chiles". He further testified that a member of the Costa Rican Rural Guard in Los Chiles, Jorge García García, fought with the *contras* against the Nicaraguan Army while off duty. (Ann. G, Attachment 4 (records of trial).)

* * *

74. In mid-1984, the Reagan Administration reached a policy decision that it would seek to open a more effective "southern front" in Costa Rica as part of a co-ordinated effort to put pressure on the Government of Nicaragua simultaneously from Costa Rican territory to the south and Honduran territory to the north. While Costa Rica was to continue to be used for military and paramilitary operations, Costa Rica's primary role in this two-front strategy was to serve as a base for organizational and propaganda activity in support of the war effort.

75. In July 1984, Joe Fernandez (alias "Tomás Castillo") arrived in San José as the Costa Rican Station Chief for the United States Central Intelligence Agency. (Thomas Castillo is the pseudonym under which he has testified in the United States Congress and is generally known; however, because his real name has also been publicly disclosed, it is used here.) (Ann. F, Attachment 3 (Testimony of Mr. Fernandez, p. 16).) As Fernandez later testified in the Joint Hearings on the Iran-Contra Investigation of the United States Congress, the *contras* in the south had to be brought under a unified leadership, based in Costa Rica. Fernandez explained that his responsibility was:

> "to develop the southern political organizations in concert with the efforts being made here in Washington and in [deleted] and in Miami to bring together the Nicaraguan resistance under one unified leadership. . . . We, in turn, encouraged the leadership to seek every means that they could to put pressure on the Sandinista regime. So there wasn't military advice, per se, but there was certainly encouragement on the part of all CIA officers to bring as much pressure as possible in the political area against the regime. . . ." (*Id.*, pp. 18-19.)

76. Militarily, Fernandez testified, the United States objective was to move the *contra* forces out of Costa Rica and into Nicaragua to engage in battle there. Allowing the military forces to continue to attack from Costa Rican bases, he explained, was causing too much embarrassment to Costa Rica and could jeopardize the success of the organizational and propaganda activities — "the political side" — conducted inside Costa Rica. Thus, Mr. Fernandez testified that the *contra* forces in Costa Rica were encouraged to:

> "go into Nicaragua, where if they claimed they were fighters is where they should be. And so it came about because of continuous large numbers of problems that we were experiencing with the [Costa Rican] government — because of the presence of these people who were not very covert in their

> — in protecting the fact of their presence in [Costa Rica] and there were a number of incidents on a continuing basis that the [Costa Rican] officials would bring to my attention and to the attention of other [ ] officials, and so wherever I had contact with them, for whatever reason [ ] I would encourage them to seek some means to leave [Costa Rica] where we felt — we, CIA, felt — that the primary value to the program was the political side". (*Id.*, p. 23.)[1]

77. Fernandez further described the efforts to move the *contras* from their bases in Costa Rica:

> "In explaining this to Negro (Fernando 'Negro' Chamorro) repeatedly would come the suggestion that they should get out of [Costa Rica] and into Nicaragua.
>
> Q. To summarize, it posed a political problem for you to have these Nicaraguans in [Costa Rica] didn't it?
>
> A. Most definitely.
>
> Q. And you tried to encourage them to get to Nicaragua and to fight to get them out of [Costa Rica]?
>
> A. Yes sir.
>
> Q. And there was a reluctance on the part of Negro Chamorro to go into Nicaragua to fight?
>
> A. Yes sir.
>
> Q. In fact, you had to be constantly encouraging him to get in there and fight, right?
>
> A. Yes sir. . . ." (*Id.*, p. 25.)

78. Shortly after the arrival of Fernandez in Costa Rica, efforts to enhance the *contra* organizing and propaganda activities centered in Costa Rica began to achieve results.

79. At the end of August, an unusual agreement was signed between the United States Information Agency and a private group of Costa Rican business leaders to permit Voice of America programs hostile to the Nicaraguan Government to be relayed from a new 50,000 wat radio station in Costa Rica. Voice of America agreements are generally made between the United States and foreign Governments, but Costa Rican law prohibits foreigners from broadcasting in the country. To circumvent this constraint, the VOA agreement was signed with a private business group formed for that purpose. A VOA spokesman, Rogene Waite, stated that President Monge had requested the establishment of the transmitter, and approved the final $3.2 million arrangement, which was formalized at his home on 30 August. (Ann. I, Attachments 11, 13.) According to Waite, the contract "ha[d] the full approval of the Costa Rican government". (Ann. I, Attachment 12.)

80. While the *contras'* political and organizational activities in San José intensified, the *contras'* military forces kept up their constant stream of military attacks on Nicaragua from their bases in northern Costa Rica. On 20 October the Nicaraguan customs post at Peñas Blancas was again attacked by *contra*

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[1] In the transcript of this portion of Mr. Fernandez' testimony, "classified" material has been deleted, but the context makes clear that Costa Rica was the country, and San José the city, to which he was referring. Where these references are clear, they are supplied in brackets; where they are not clear, the deletion of material is indicated in brackets.

forces from Costa Rican territory. (Ann. A, Attachment 151 (Diplomatic Note of Nicaragua).)

81. On 31 October 1984, Costa Rican Foreign Minister Carlos José Gutierrez, in response to Nicaraguan denunciations of *contra* attacks from Costa Rica, denied that the attack had come from Costa Rica. Gutierrez admitted, however, that "the control [i.e., by Costa Rican forces] that is exercised in this zone, as in the whole frontier region, is absolute . . .". (Ann. A, Attachment 142 (Diplomatic Note of Costa Rica).) Thus, it can only be concluded that the *contras'* use of Costa Rican territory to attack Nicaragua was permitted by the Costa Rican forces who controlled that territory.

82. In November and December 1984, a series of meetings were taking place in both Costa Rica and the United States among representatives of the United States Government, *contra* leaders, John Hull, and others, to plan ways to "help the remnants of the Southern Front". (Ann. F, Attachment 3 (Testimony of Mr. Owen, p. 22-4).) Robert W. Owen, a consultant to the United States Department of State who served unofficially as an agent for Lt. Col. Oliver North, Director of Political-Military Affairs for the United States National Security Council, traveled to Costa Rica in October 1984, where he met with Adolfo Calero of the FDN and John Hull. At that meeting, Hull agreed "to do anything he could" to help the southern front. *(Id.)* Subsequently, Owen and Hull attended other meetings in the United States to discuss the location of bases, farms and airstrips to be used in Costa Rica, and the manner in which Hull would co-ordinate the war effort in northern Costa Rica from his farm there. (Ann. G, Attachment 2, pp. 14-15.)

1985

83. These efforts to solidify the southern front intensified in early 1985. In February, the tactical aspects of the war were further discussed in meetings with Hull, Calero and others in Miami. At these sessions, plans were made to obtain arms, move them to Hull in Costa Rica, and distribute them for use in the attacks on Nicaragua from Costa Rican bases. (*Id.*, at p. 15.) CIA officer Fernandez reported that he too attended a series of meetings "concerning the future of the Southern Front", held both "in the South and in Washington". (Ann. F, Attachment 3, Exhibits to Testimony of Robert W. Owen (Exhibit RWO-7), pp. 1-2.)

84. Meanwhile, the regular attacks from Costa Rican territory against Nicaraguan targets continued in 1985:

> On 26 January four health-care workers were kidnapped from Rama Key, Zelaya, Nicaragua, by a group of 30 armed men, who later engaged Nicaraguan forces in combat. The available information indicated that they were being held in Costa Rica by forces commanded by Edén Pastora. They were subsequently released in Costa Rica. (Ann. A, Attachment 174 (Diplomatic Note of Nicaragua, 18 February 1985).)
>
> On 28 January the "La Flor" estate near Cardenas was attacked by *contra* groups coming from Costa Rican territory. The attackers kidnapped three Nicaraguan citizens and fled, taking the victims in the direction of Costa Rica. (Ann. A, Attachment 170 (Diplomatic Note of Nicaragua).)

85. On 7 February 1985, Nicaragua sent a Diplomatic Note to Costa Rica, attaching

"a list of the camps, houses of operations, names, and addresses of the mercenary terrorists belonging to the counter-revolutionary military organizations which operate in Costa Rica, so that [Costa Rica] may proceed to dismantle their support structures and capture, disarm, and remove their members from the border, with a view to definitively expelling them from Costa Rica". (Ann. A, Attachment 171 (Diplomatic Note of Nicaragua).)

86. Nonetheless, the support structures were not dismantled, and there was no lessening of the *contra* activities launched from Costa Rica, with official Costa Rican knowledge, approval and assistance.

87. On 6 March a group of five foreign mercenaries, from the United States, France and Great Britain, loaded a shipment of weapons on a chartered aircraft in Ft. Lauderdale, Florida, for eventual delivery to *contra* forces in Costa Rica. The plane was flown, with two of the mercenaries on board, to Ilopango Air Base in El Salvador. (Ann. I, Attachment 29.) The five mercenaries then flew to San José on a commercial flight, and traveled by land to northern Costa Rica. The arms were then delivered to John Hull's airstrip in Costa Rica, in fact, Robert Owen testified that he was present at John Hull's farm in Costa Rica when the arms shipment arrived. (Ann. F, Attachment 3 (Testimony of Mr. Owen, p. 11-3). See also, Ann. F, Attachment 5, *"Private Assistance" and the Contras*, Report of Staff of Senator John Kerry, p. 9; Ann. G, Attachment 2, pp. 15, 24; Ann. I, Attachments 18, 30.)

88. Additional attacks in early 1985 included these:

On 13 February 1985, a group of approximately 40 *contras* attacked the "El Naranjo" border post from Costa Rican territory. (Ann. A, Attachment 176 (Diplomatic Note of Nicaragua).)

On 18 February approximately 60 *contras* attacked the border post at Peñas Blancas with mortars, machine guns and rifle fire. Fifteen minutes later, they launched four grenades, wounding a border guard. After the attack, Nicaraguan Army Lieutenant Luis Timoteo Rocha spoke with Costa Rican Lieutenant Mamberto Ruiz, who confirmed that the attack had been carried out from Costa Rican territory. (Ann. A, Attachment 175 (Diplomatic Note of Nicaragua).)

On 1 March approximately 15 *contras* attacked the post of Peñas Blancas, this time from positions located about 250 meters north-east of the Costa Rican customs office. The *contras* used rifles, grenade launchers, and machine guns. Nicaraguan Lieutenant Luis Timoteo Rocha again communicated with Costa Rican Lieutenant Mamberto Ruiz, who again acknowledged that the attack had come from Costa Rica. (Ann. A, Attachment 181 (Diplomatic Note of Nicaragua).)

On 18 March one Nicaraguan was killed when a group of *contras* operating from Costa Rican territory engaged Nicaraguan forces located at San Juan del Norte. (Ann. C, Attachment 1.)

On 14 April a group of armed men carried out an attack from Costa Rican territory on the Nicaraguan border post of La Esperanza, near San Carlos, Río San Juan, using rifle fire, 81 mm mortars and RPG-4 rocket launchers. (Ann. A, Attachment 184 (Diplomatic Note of Nicaragua).)

On 27 April a group of armed men again attacked the border post of La Esperanza from Costa Rican territory, using rifles and RPG-7 grenade launchers. The weapons sent to John Hull's estate from Ft. Lauderdale by the five foreign mercenaries in March were used in this attack, in which one of these mercenaries participated. (Ann. A, Attachment 186 (Diplomatic

Note of Nicaragua); see also Ann. F, Attachment 5 (Report of Staff of Senator John Kerry, p. 9).)

On 24 June an olive-green helicopter resupplied a group of *contras* located near Nueva Guinea, Zelaya Sur, and withdrew in the direction of Costa Rican territory. (Ann. C, Attachment 1.)

89. First-hand reports of Costa Rican Government complicity in the *contras'* operations also continued to surface during this period. In May 1985, Col. Ricardo Rivera, former Director of the Rural Guard, charged at a press conference that government officials maintain close ties with *contra* forces, and that training camps were operating in Costa Rica with the complicity of ranking police and government officials. (Ann. H, Attachment 58.)

90. Two Cuban-American mercenaries who joined the UDN/FARN forces of Fernando "Negro" Chamorro, and were later captured and tried in Nicaragua, declared that in early 1985 they were actively assisted in Costa Rica by a Costa Rican Civil Guard officer named Colonel Rodrigo Paniagua Salazar, who helped them get through Costa Rican immigration and customs with suitcases full of military supplies in February 1985. They also claimed to have stayed in a San José "safe house" and on John Hull's farm before moving to a UDN/FARN camp near the north-western Costa Rican border town of Upala. (Ann. I, Attachment 42.)

91. In May, several witnesses implicated the Costa Rican Government in *contra* activities during the trial of the libel case brought in Costa Rica by John Hull against journalists Martha Honey and Tony Avirgan. For example, Peter Glibbery, the British mercenary who had come from Florida to Costa Rica to join the *contras* (and was arrested in April), testified that "Mr. Hull sent up a Captain Segura of the Costa Rican Rural Guard who drove us out to the training base we were setting up on Mr. Hull's farm. . . ." (Ann. G, Attachment 2, p. 23.) Carlos Rojas Chinchilla, another witness, testified that he was kidnapped to Hull's farm because of information he had obtained concerning Hull's activities, and that before he escaped he saw "people there wearing green uniforms with the Costa Rican flag on the arm". (Ann. G, Attachment 2, pp. 38-39.)

92. On 19 June Costa Rican Foreign Minister Carlos José Gutierrez stated in an interview that he would regard a change of government in Nicaragua with approval and called on the United States Congress to give its support to the mercenary forces which were committing armed attacks against Nicaragua. (Ann. I, Attachment 16. See Ann. A, Attachment 194 (Diplomatic Note of Nicaragua, 21 June 1985).) President Monge had flown to Washington two months earlier to lend his public support to the Reagan Administration's request for additional funding for the *contras*. (Ann. I, Attachment 15.)

93. As of July, a number of airstrips on Costa Rican territory were in regular use by the *contras* for transfer of weapons and personnel. Among these were landing areas on the estate of John Hull; the Las Loras Airport in Puntarenas; the estates of Climaco Salazar in the Los Chiles sector, also used for weapons storage by the *contras*; and the estate known as El Chapernal, where planes bringing arms from Panama landed in 1985. (See Ann. C, Attachments 3, 4.)

94. Among *contra* facilities located in Costa Rica as of July were the "Taller" or "Corinto" base, on the Costa Rican side of the San Juan River, 5 kilometers from La Penca; offices and buildings located in Escazu and used by Pastora for communications and political activities; a warehouse and communications center in San José; and another communications base in the locality of El Zarcero. *(Id.)*

95. In June and July, attacks launched from such bases in Costa Rica included the following:

> Between 20 June and 4 July over 20 attacks were sustained at La Penca, Nicaragua, in a continuing series of rifle, cannon and mortar attacks undertaken from Costa Rican territory. Three Nicaraguans were killed and four were wounded. These attacks were carried out with impunity from positions in Costa Rica close to the Civil Guard post at the mouth of the San Carlos River. (Ann. A, Attachments 193, 194, 196, 204 (Diplomatic Notes of Nicaragua); Ann. I, Attachment 17.)
>
> At the beginning of July 1985, *contra* mobilizations were observed across from the Nicaraguan army post at Papaturro. At the same time, an FDN base was identified at La Lucha, 3 kilometers from the Nicaraguan border on the Costa Rican side. (Ann. A, Attachment 196 (Diplomatic Note of Nicaragua).)
>
> On 7 July three Nicaraguans were wounded when a group of *contras* attacked the Cano Machado sector from Costa Rican territory. (Ann. C, Attachment 1.)
>
> On 18 July a group of *contras* attacked the San Rafael sector from Costa Rican territory with rifle fire, heavy machine guns and mortars, wounding four Nicaraguans. (Ann. C, Attachment 1.)
>
> Seven Nicaraguans were wounded in attacks on the San Rafael sector by *contras* based in Costa Rica. The attacks, which lasted from 17 to 22 July were carried out with cannon, mortars and 50-caliber machine guns. (Ann. A, Attachment 202 (Diplomatic Note of Nicaragua).)

96. In late July, an ARDE helicopter carrying Edén Pastora — supposedly ordered out of Costa Rica, but always turning up there — crashed inside Costa Rican territory, near the Costa Rican village of Veracruz de Pital, about 25 miles south of the Nicaraguan border. Pastora and two companions were injured. Pastora was treated for his injuries at a local hospital, and then allowed to fly to Panama. (Ann. I, Attachments 20, 21, 22.)

97. Also in July, the foreign mercenaries who had traveled and shipped arms to Costa Rica from Florida in March made extensive public statements about their activities in Costa Rica and the involvement of Costa Rican authorities. Steven Carr, a United States citizen, and Peter Glibbery, a Briton, told reporters that the Costa Rican Civil and Rural Guards had provided extensive intelligence and other assistance to *contra* groups operating along the Nicaraguan border. They said that members of the Civil Guard had given them precise information, including maps and diagrams of targets inside Nicaragua, and that one of the guards had accompanied them on one of their incursions into Nicaragua. Steven Carr said that Costa Rican neutrality was a farce, and that the mercenaries had enjoyed "one hundred per cent support" from Costa Rica. (Ann. H, Attachment 59.) In particular, they said that the Costa Rican Civil Guard had actively helped them to carry out an attack on the Nicaraguan border post of La Esperanza on 11 April. A colonel in the Civil Guard had shown them access and resupply routes on a map and had put pick-up trucks at their disposal. Carr said that one of the Civil Guards had in fact served as a guide for the attack. Another of the mercenaries, Frenchman Claude Chafford, who said he had trained armed groups in camps inside Costa Rica a few kilometers from the Nicaraguan border, stated that he traveled to one such camp in the company of a major in the Civil Guard, and that over a period of nearly two months they received friendly visits almost every day from members of the Guard in the region, who promised them protection. (Ann. A, Attach-

ment 197 (Diplomatic Note of Nicaragua); see also Ann. I, Attachments 18, 19, 32.)

98. By July 1985, the political component of the strategy that CIA Station Chief Fernandez had sought to implement on his arrival in San José a year earlier — that is, the unification of the southern factions under one organization, and the intensification of their propaganda activities centered in San José — had begun to bear fruit.

99. On 12 June 1985, the United Nicaraguan Opposition (UNO) was formed, joining together Arturo Cruz, an opponent of the Nicaraguan Government residing in the United States; Alfonso Robelo of ARDE; and Adolfo Calero of the FDN. (Ann. E, Attachment 2, No. 17.) Six weeks later on 26 July a new umbrella organization called "Opposition Bloc of the South" (BOS) was founded in San José. The "constitution" of BOS was published in an advertisement in *La Nación* on 2 August 1985, and reprinted in a glossy pamphlet published in San José later that year. The BOS "constitution" explicitly called for military action to overthrow the Government of Nicaragua, stating in part:

> "We resolve
>
> . . .
>
> 5) To legitimize the resistance that in the face of Managua's dictatorial repression is carried out with arms in hand by thousands and thousands of patriots in national territory." (Ann. E, Attachment 1 ("B.O.S.: Opposition Bloc of the South", San José, 1985 (English text quoted from original)); Ann. E, Attachment 2, No. 18.)

100. In its 1985 pamphlet, BOS also printed a "Declaration of Principles" which stated in part:

> "We reaffirm . . .
>
> . . .
>
> That we declare as legitimate the struggle for defense that with arms in hand, is carried out by thousands of patriots throughout the national territory.
>
> . . .
>
> Finally, we make a call to all Nicaraguans of good will so that with patriotism and love to *[sic]* liberty, we may overcome all the obstacles existing until today, and we may forge the great Unity that is to take us to the definite liberation of Nicaragua." (Ann. E, Attachment 1 ("B.O.S.: Opposition Bloc of the South", San José, 1985).)

101. On 19 July 1985, UNO leaders Arturo Cruz, Alfonso Robelo and a representative of Adolfo Calero addressed a public rally in San José commemorating the sixth anniversary of what they called the "betrayal of the Nicaraguan revolution" with a dramatic display of apparent unity and yet another call to unite their fight and oust the Sandinista régime. (Ann. I, Attachment 23.)

102. In addition, in early 1985 two new *contra* publications, produced in San José, appeared as bi-weekly "supplements" to Costa Rican newspapers. The masthead of one of them, *Nicaragua Hoy*, carried the names of several prominent opponents of the Government of Nicaragua, including Arturo Cruz, a member of the UNO Directorate; his son Arturo Cruz Sequeira; Pedro Joaquín Chamorro, a member of the Permanent Advisory Committee of UNO; and Fabio Gadea Mantilla, Vice-President of the MDN. (Ann. E, Attachment 4; Ann. J.) The other, which carried the full title *Toward Our Liberation: Official*

Organ of the United Nicaraguan Opposition, is generally referred to by its short title, *Liberación*. Its editorial board included Orion Pastora, the longtime San José spokesman for the paramilitary organization ARDE. (Ann. E, Attachment 3.)

103. *Liberación* and *Nicaragua Hoy*, which continued to be published in San José as of mid-1987, offer blatant propaganda in support of the *contra* cause. Articles affirming that military action is required to change the Nicaraguan Government, and calls for support for organizations dedicated to the military overthrow of the Nicaraguan Government, are interspersed with interviews with *contra* military commanders and shrill and sensationalized stories purporting to describe events in Nicaragua. The overwhelming message — that force or violence should be used against the Government of Nicaragua — is plain. For example, under the headline "The Resistance Reacts to the Decision of the [U.S.] Congress", *Nicaragua Hoy* published a declaration signed by UNO leaders Calero, Cruz and Robelo which stated in part,

> "The Resistance restates its indissoluble covenant with the Nicaraguan people to struggle to the ultimate consequences for the democratization of the country and the rescue of our national sovereignty."

The same issue carried an interview with the *contras'* supreme military commander, Enrique Bermúdez. A former colonel in the Somoza National Guard, Bermúdez, "somewhere in Jinotega" (Nicaragua), was quoted as asserting that the defeat in the United States Congress of a $14 million *contra* aid package was merely a temporary setback; according to Bermúdez, this was

> "only the first step leading to our victory . . . We have gotten aid from elsewhere and now we have all we need to begin our military operations anew, with greater intensity than before." (Ann. E, Attachment 4, No. 1.)

104. With the political unification and propaganda components of the Southern Front well under way by July 1985, the United States — with the support and collaboration of Costa Rican government officials at the highest level — intensified its effort to improve the military situation in the south, and specifically to move the *contra* forces out of their bases in Costa Rica and into Nicaragua to fight there. Thus, when Lewis A. Tambs, appointed as the new United States Ambassador to Costa Rica, departed in July for San José, he was explicitly instructed by members of the "Restricted Interagency Group" (including Lt. Col. Oliver North and Assistant Secretary of State Elliot Abrams) that his mission was "to aid the Nicaragua Resistance Forces in setting up a 'Southern Front'". (Ann. F, Attachment 2 (Tower Commission Report, p. C-12); Ann. F, Attachment 3 (Testimony of Mr. Tambs, p. 2-1).) When asked what this mission meant to him, Ambassador Tambs responded that "the idea was that we would encourage them to fight". (Ann. F, Attachment 2 (Tower Commission Report, p. C-12).) As he further explained, his assignment was to get the *contras* out of Costa Rica and into Nicaragua, and assure them of logistical support once inside Nicaragua. As he testified to the United States Congress:

> "AMB. TAMBS: Well, the question was, how you were going to get the armed democratic resistance out of Costa Rica, and, of course, that was something which both the Costa Ricans and we were interested in, and the only way that you could get them out of Costa Rica was assure them that they would have logistical support inside Nicaragua. And, by inside Nicaragua, we're talking about, you know, 80 to 100 kilometers, say 50 to

> 60 miles, because there were some forces, particularly belonging to Mr. Pastora, who were sitting in Nicaraguan territory on some islands in the San Juan River, which were about 5 to 10 feet from the shore of Costa Rica. So, obviously, that was not the sort of thing we were thinking about. So, the idea is that how do you get them to move? Well, you're going to have to feed them, supply them . . ." (Ann. F, Attachment 3 (Testimony of Mr. Tambs, p. 29-1).)

105. When Ambassador Tambs arrived in Costa Rica, he undertook to carry out this mission. As the Tower Commission reported, based on an interview with an unnamed "CIA field officer", plainly CIA Station Chief Fernandez:

> "When Ambassador Tambs arrived in Costa Rica, he called together the Deputy Chief of Mission, the Defense Attache and myself, and said that he had really only one mission in Costa Rica, and that was to form a Nicaragua resistance southern front." (Ann. F, Attachment 2 (Tower Commission Report), p. C-12.)

106. The message apparently reached *contra* forces right away, as *contra* leaders announced at the end of August that they were "redoubling their efforts along the Costa Rican border with Nicaragua as part of a new southern front strategy . . .". (Ann. I, Attachment 28.)

107. A critical element in sustaining the contemplated southern front — and specifically in ensuring the necessary logistical support to the *contra* forces once they entered Nicaragua — was the construction of a new airbase inside Costa Rica, near the border, for the loading, fueling and repair of aircraft engaged in supply drops to *contras* inside Nicaragua. According to Fernandez, "the establishment of an airfield down in Costa Rica would be significant in order to be able to supply whatever *contras* may enter into Nicaragua and fight inside Nicaragua" (Ann. F, Attachment 3 (Testimony of Mr. Fernandez, p. 101)); indeed, he testified, such an airfield was "an essential or integral part of any supply effort". (*Id.*, pp. 33, 145.) Thus, the CIA field officer interviewed by the Tower Commission — obviously Fernandez, although again he is not named — stated that the construction of such an airfield was a "pet project" of Ambassador Tambs. (Ann. F, Attachment 2 (Tower Commission Report), p. C-12.)

108. Approval had to be obtained from the Costa Rican Government before the airbase could be built, however. (Ann. F, Attachment 3 (Testimony of Assistant Secretary of State Abrams, p. 13-2).) Therefore, Lt. Col. North asked Ambassador Tambs, shortly after he arrived in Costa Rica, whether the Costa Rican Government would "go along" with the airbase. (Ann. F, Attachment 2 (Tower Commission Report), p. C-12.) Ambassador Tambs' response was to initiate "negotiations" with the Costa Rican Government to obtain such approval. (Ann. F, Attachment 3 (Testimony of Mr. Tambs, pp. 7-2 to 8-1).) His negotiations were successful, and President Monge approved construction of the airbase. Ambassador Tambs testified:

> "AMB. TAMBS: The negotiations yielded an airfield which could be used for reinforcement and resupply, if there were an invasion from Nicaragua. At the same time, the airfield would be used for refueling and for emergency purposes [of] private aircraft which would be used to supply the Nicaraguan Democratic Resistance, which obviously would have to move inside Nicaragua to be resupplied, then, right?

> Q: Did you agree, also, that the airstrip would be deeded to the Costa Rican government?
>
> A: Yes." (*Id.*, p. 8-1.)

Later in his testimony, Ambassador Tambs was even more explicit:

> "Q: With regard to the airstrip that was constructed in Costa Rica, is it fair to say that that was done only after permission was granted by the authorities of Costa Rica?
>
> A: Yes, Sir". (*Id.*, p. 35-1. See also, Ann. F, Attachment 3 (Testimony of Mr. Fernandez, pp. 36-37).)

109. Former President Monge has also acknowledged his approval of the new airbase. (See, e.g., Ann. I, Attachment 56, the exclusive interview he later gave to the *Tico Times* ("Monge Says He Okayed Strip in '85", 16 January 1987).) Costa Rica's current Foreign Minister, Rodrigo Madrigal Nieto, has also confirmed that the Monge Government authorized construction of the airstrip. (Ann. I, Attachment 62.)

110. After the Costa Rican Government granted the necessary approval for construction of the airbase, an appropriate site had to be selected. Accordingly, in August 1985 the CIA's Fernandez, joined by Robert Owen (Lt. Col. North's representative who flew to Costa Rica from Washington), met with a Costa Rican Colonel to discuss two possible locations. (Ann. F, Attachment 3 (Testimony of Mr. Owen, pp. 2-2 to 2-3).) Fernandez, Owen and the Costa Rican colonel then visited the potential sites to inspect them (Ann. F, Attachment 3 (Testimony of Mr. Owen, p. 3-1); Ann. F, Attachment 3 (Testimony of Mr. Fernandez, pp. 38-42, 99)), flying out "on a Costa Rican government helicopter". (Ann. F, Attachment 3 (Testimony of Mr. Owen, p. 18-3).) As Fernandez has testified, "the colonel and I walked around with Rob Owen, who took pictures of the land". (Ann. F, Attachment 3 (Testimony of Mr. Fernandez, p. 41).) Ultimately, they selected an isolated spot on the Santa Elena peninsula in the northern province of Guanacaste, approximately 10 km south of the Costa Rican Civil Guard training base at Murciélago, 20 km south of the Nicaraguan border. The site is in an area where *contra* forces under the leadership of Fernando "El Negro" Chamorro had been active. It is in a narrow valley surrounded by mountains on three sides and the Pacific Ocean on one side, and near a deep-water port that can be used to land supplies. (Ann. I, Attachments 45, 46, 49.)

111. At that time, the property selected was owned by a United States citizen living in New York, and managed by a colonel in the Costa Rican Civil Guard. It was decided that the colonel would turn over the property for development of the airbase, which, once completed, would be "designated a military zone and . . . be guarded by the Colonel's people". (Ann. F, Attachment 3, Exhibit to Testimony of Mr. Owen (Exhibit RWO-9, a memorandum dated 25 August 1985, from Fernandez ("Tomas Castillo") to Lt. Col. North describing the selection of the Santa Elena site and the plans for its development); see also Ann. I, Attachment 48.) According to this plan, the property was promptly acquired by a newly-chartered Panamanian company, Udall Research Corporation, created for this purpose by agents of Lt. Col. North. (Ann. F, Attachment 2 (Tower Commission Report), pp. C-11 to C-12.)

112. Construction of the airbase was undertaken over the next several months. The work consisted of expanding and improving an abandoned 820 meter strip built in the 1940s into a modern airfield nearly 2 kilometers, or 1.2 miles long, as well as building other necessary facilities. The work was per-

formed by United States engineers with the assistance and co-operation of the Costa Rican Civil Guard. Employees of the neighboring Santa Rosa National Park, and local residents, have confirmed that the Civil Guard Commander based in the Guanacaste city of Liberia, Col. Ramon Montero, obtained permission from park officials to bring workers and equipment through park lands to work on the project. Col. Montero has admitted that he was the project administrator. After he obtained permission to use park land for access to the site, Civil Guard vehicles carrying United States engineers and workers shuttled back and forth over park roads, according to eyewitnesses. A local contractor, Leon Víctor Arrieta, has further stated publicly that he was hired to do the construction work with the advice of United States personnel and the protection of the local police commander. (Ann. I, Attachments 46, 47, 49, 55.)

113. In December 1985, when United States National Security Adviser, Vice Admiral John Poindexter visited Costa Rica to discuss the airbase and the Costa Rican Government's co-operation with the *contras* in general. He testified to the United States Congress:

> "[I]n Costa Rica we did discuss there for example, the private landing strip that was being constructed in the northwest corner of the country . . . of Costa Rica. And we discussed, in general, measures that could be taken to encourage the co-operation between the government of the country involved and the Democratic resistance forces." (Ann. F, Attachment 5 (Testimony of Adm. Poindexter, p. 2-1).)

Admiral Poindexter then informed the President of the United States that the Santa Elena airbase "was a dramatic display of co-operation and support for the President's policy by the country involved". (*Id.*, p. 4-2.)

114. On 23 April 1986, President Monge's Minister of Public Security, Benjamín Piza, who had authority over the airbase at Santa Elena, attended a private meeting with President Reagan, Lt. Col. North, and CIA Station Chief Fernandez in Washington, at the White House. The meeting was kept secret at the time and has never been fully explained. According to some reports, the United States arranged the meeting as a strategy session to determine how to ensure continued operation of the Santa Elena airbase and the continued use of Costa Rica as a base for *contra* operations in general; according to others, it was to thank Piza for the past co-operation of the Costa Rican Government. (Ann. I, Attachments 58, 59. See also Ann. F, Attachment 4, Report of the United States Senate Select Committee on Intelligence, 2 February 1987, p. 42; Ann. F, Attachment 6 (Exhibits to Testimony of Oliver L. North) (Exhibit OLN 258).)

115. The Santa Elena airbase remained secret until September 1986, even though the Government of President Oscar Arias Sanchez, inaugurated in May 1986, was well aware of its existence at least since June of that year. (Ann. I, Attachment 54.) In fact, after the inauguration of the Arias Government, a Civil Guard lieutenant was reported to have taken charge of the project. (Ann. I, Attachment 46.) In September 1986, however, the Arias Government finally ordered the airbase "raided" by the Civil Guard, and it was shut down. Public Security Minister Hernan Garron asserted at that time that the landing strip had been expanded during the Monge administration as part of a "tourism project". *(Id.)* It is well documented, however, that it was intended — and was in fact used — to serve as a base for the loading, fueling and servicing of aircraft supplying the *contras*. United States Ambassador Tambs and CIA officer Fernandez, among others, have confirmed that that was its purpose, as shown above. And

the airfield was in fact used to serve that end. As Lt. Col. North stated in a 30 September 1986 memorandum:

> "The airfield at Santa Elena has been a vital element in supporting the resistance. Built by a Project Democracy proprietary (Udall Corporation S.A. — a Panamanian Company), the field was initially used for direct resupply efforts [to the Contras] [July 1985-February 1986] . . . the field has served as the primary abort base for aircraft damaged by Sandinista anti-aircraft fire." (Ann. F, Attachment 2 (Tower Commission Report), pp. C-11 to C-12 (brackets and ellipses in original).)

Ambassador Tambs also told the Tower Commission that "the airstrip was used mainly for refueling before Contra resupply planes returned to 'wherever they were coming from' ". (*Id.*, p. C-12. See also Ann. F, Attachment 3 (Testimony of Mr. Tambs, pp. 8-1, 41-2); Ann. F, Attachment 3 (Testimony of Mr. Fernandez, pp. 89, 101-104).) While Mr. Fernandez maintained that the airfield was never put into "regular use", he too acknowledged that it was in fact used to service planes "in neutral Costa Rica loaded with lethal supplies [i.e., weapons]" bound for *contras* in Nicaragua. (*Id.*, p. 89.)

116. When the existence of the airbase was made public in September 1986, it was disclosed that the facility had considerable military capacity. In addition to the 1.2 mile landing strip, a modern military barracks for 30 men had been built. Moreover, 5,000 gallons of fuel were maintained at the site. Area residents reported they had seen "large cargo planes circling the area" and a camouflaged "Hercules" aircraft "coming down over the hills". Fresh tire ruts were also found at the airstrip itself. (Ann. I, Attachments 46, 47, 49.) And, according to one area resident who was in the Santa Rosa National Park as the Civil Guards came out after their raid with 300 barrels of aviation gas and numerous closed crates:

> "One [Guard] captain told me that the stuff belonged to the contras. . . . He said, 'we had to do this operation without saying anything to the press because it could affect Costa Rica's image in The Hague'." (Ann. I, Attachment 46.)

*

117. Meanwhile, during the last five months of 1985, while the airbase on the Santa Elena peninsula was being built and put into operation, the *contra* attacks launched from Costa Rican territory continued. Indeed, in August, the head of the Social Christian Unity Party in the Costa Rican Assembly, Deputy Danilo Chaverri Soto, denounced the Costa Rican Government's tolerance of the Nicaraguan rebels who use Costa Rican territory for their operations, and suggested that an independent investigation would corroborate his assertions. He stated that he had personally confirmed these facts and that he had reported them to the Minister of Public Security. Former Costa Rican Director of Public Security, Juan José Echeverría, also charged that "Monge lets [the guerrillas] operate". (Ann. I, Attachment 27.)

118. During August, interviews with Nicaraguan "refugees" staying at a Red Cross camp in northern Costa Rica revealed that many were *contra* forces regrouping after battles with the Nicaraguan Army. According to one member of ARDE, approximately one-third of the 3,000 men in the camp had fought with Pastora's forces. After numerous interviews, the interviewer concluded

that the camp had become "as much a way station for *contras* as it is a camp for civilian refugees". (Anm. I, Attachment 25.)

119. In August, ARDE forces operating from Costa Rica seized a group of 29 members of a United States organization called Witness for Peace, and 18 journalists accompanying them, as they traveled on a barge on the San Juan River. The group was held captive in Costa Rican territory for several days. (Ann. I, Attachment 24.) According to NBC television correspondent John Basco, who was abducted with the group, the captors were ARDE forces. (Ann. I, Attachment 26.) Pastora also admitted later that it was his group that seized the barge; he revealed, in fact, that CIA Station Chief Fernandez radioed an instruction to him from San José not to harm anyone because the CIA had infiltrated an agent into the group. (Ann. I, Attachment 61. See also Ann. K (the report published by Witness for Peace on this incident).)

120. Specific attacks occurring from August to the end of 1985 included the following:

> On 21-29 August a series of attacks against the Nicaraguan border posts at Boca de San Carlos, La Penca, and Peñas Blancas was carried out from Costa Rican territory. (Ann. A, Attachments 211, 213, 214 (Diplomatic Notes of Nicaragua to Costa Rica).)
>
> On 1 September a Cessna airplane proceeding from Costa Rican territory overflew the Lomas del Lobo sector, 30 km north-east of San Miguelito, where it dropped parachutes with military supplies to a group of *contras*. (Ann. C, Attachment 1.)
>
> On 30 October the Nicaraguan border post at Boca de San Carlos was attacked from the customs post directly opposite it on Costa Rican territory, and from the area immediately surrounding the Costa Rican post. The attackers used rifles, mortars, machine guns, and 82 mm cannon. Later on the same day, the Boca de San Carlos was again attacked from Costa Rican territory. The attackers openly moved about in vehicles on the Costa Rican side. (Ann. A, Attachment 233 (Diplomatic Note of Nicaragua).)
>
> Between September and December 1985, armed attacks from Costa Rica were also mounted against Nicaraguan positions at or near Peñas Blancas (4 September); the Delta of the San Juan River (7 September, 7 October); La Penca (27 September, 7 October, 19 October, 22 October); Cano Machado (27 September); and Boca de San Carlos (27 September, 30 October). *Contras* also attacked Nicaraguan territory from the Costa Rican sector of Sarapiqui (7 October). Movements of groups of armed men on Costa Rican territory were detected in the vicinities of the Cano Machado and El Venado sectors (18 October), Boca de San Carlos (30 October), and La Isla La Culebra and Santa Isabel (4 December). Nicaraguan aircraft flying over Nicaraguan territory were fired upon from Costa Rican territory on 8 September, 9 September, and 3 October 1985. Nicaragua repeatedly protested these incidents in diplomatic correspondence with Costa Rica. (Ann. A, Attachments 218, 219, 220, 222, 223, 224, 225, 226, 228, 229, 232, 233, 237 (Diplomatic Notes of Nicaragua).)

121. At the end of 1985, at least 27 *contra* camps were established in Costa Rica, despite the fact that Nicaragua had repeatedly informed the Costa Rican Government of the nature and locations of *contra* bases and *contra* activities on its territory. (See, i.e., Ann. A, Attachment 171 (Diplomatic Note of Nicaragua).) The precise locations of these bases are stated in Ann. C, Attachment 5, Table 1.

1986-1987

122. Notwithstanding the inauguration of President Arias in May 1986, and his renewed proclamations of Costa Rican "neutrality", both the *contra* political activities in San José and *contra* attacks against Nicaragua from bases inside Costa Rica have continued. (See Ann. E, Attachment 2, Nos. 19, 20; Ann. E, Attachment 4, No. 8; see also *infra*, paras. 127, 140.)

123. Alfonso Robelo and other leaders of UNO and BOS continued to live in San José, where they conducted political and organizational activities linked to the armed struggle to overthrow the Government of Nicaragua. (See Ann. J, Attachments 4 and 5.) For example, in February 1986, in an interview given at his residence in San José, Robelo called for the approval of substantial United States military aid to armed groups fighting the Government of Nicaragua. (Ann. A, Attachment 253 (Diplomatic Note of Nicaragua).) Following the United States House of Representatives' rejection in March 1986 of President Reagan's request for $100 million for the *contras*, Robelo and other San José-based *contra* leaders expressed optimism that the defeat was only temporary. Fabio Gadea, UNO's representative in San José, claimed: "We have lost a battle, but not the war." (Ann. I, Attachment 31.)

124. In May 1986, military leaders of ARDE and FARN announced in San José that they had agreed to unite under UNO, whose forces also included those of the Honduras-based Nicaraguan Democratic Force (FDN). (Ann. H, Attachment 60.) As part of the accord with UNO, the military commanders agreed that Fernando "Negro" Chamorro, of the UDN/FARN, would lead the military forces in the south of Nicaragua. (Ann. I, Attachment 33.) Edén Pastora did not join UNO, but certain of his military commanders, reportedly lured by promises of a flow of cash and arms from the CIA, agreed to join UNO and accept Chamorro as their leader. (Ann. I, Attachments 35, 39.)

125. Defeated by the Nicaraguan Army and abandoned by his commanders, Pastora announced through a spokesman in San José that he was leaving the armed struggle against the Nicaraguan Government. (Ann. H, Attachment 61; Ann. I, Attachment 34.) The Arias Government quickly granted him political asylum in Costa Rica. (Ann. I, Attachments 36, 37.)

126. In June, Robelo publicly proclaimed in San José that armed *contra* groups could "win their war" if they received sufficient United States support. (Ann. I, Attachment 38.)

127. Later in June, UNO and BOS — the two major Costa Rican-based *contra* groups — announced in San José, at a ceremony at the Balmoral Hotel, that they had concluded a formal co-operation agreement. (Ann. I, Attachment 41; see also Ann. E, Attachment 2, No. 19.)

128. And in August, BOS held its first "Congress", a gathering of 78 delegates in San José, to hammer out a constitution and a political agenda. BOS' "foreign relations secretary", Octaviano Cesar, claimed that $100 million of United States assistance "won't be enough to get rid of the Sandinistas, but it should be enough for us to take a piece of territory and hold it". Octaviano Cesar's brother Alfredo, a member of the BOS executive committee, agreed that BOS' goal was to take territory inside Nicaragua by early 1987, and also "to develop a front in Nicaragua's urban areas". (Ann. I, Attachment 44.)

129. In October 1986, UNO held a three-day meeting of its Consultative Assembly in San José. One representative at the conference, Jaime Martínez, was quoted as saying,

> "the Assembly constitutes vital support — in every sense of the word — for the directorate of the UNO and, by extension, for the combatants who

are generously sacrificing themselves to open our path of return to our country". (Ann. E, Attachment 3, No. 7.)

130. On 24 November 1986, another session of the "Assembly" of UNO was held in San José with the authorization of the Costa Rican Government. The purpose of this "Assembly" was to make plans for an armed offensive against Nicaragua and the subsequent installation of a "provisional government". The "Assembly" was widely publicized by "Radio Impacto", a radio station based in Costa Rica which regularly broadcasts messages calling for the armed overthrow of the Nicaraguan Government. (Ann. A, Attachments 267, 268 (Diplomatic Notes of Nicaragua); Ann. H, Attachment 63. See also Ann. I, Attachment 53.)

131. Internal UNO documents reveal, further, the specific monthly expenditures incurred by UNO for "UNO/COSTA RICA" during a six-month period in late 1985 and early 1986. Among the categories of activities for which expenses are recorded are one for "Radio" (over $69,000 in initial expenses and $5,825 monthly) and others for various committees (e.g., youth, labor, legal, educational). (Ann. J, Attachment 1.) Another internal UNO document, the minutes of a meeting on 28 August 1985 of UNO's directors and advisory council, refers to specific projects in Costa Rica and reports that "the house in Costa Rica and existing facilities were discussed". (Ann. J, Attachment 4.)

132. The UNO office in San José served as a center for UNO's efforts to destabilize Nicaragua from Costa Rica. For example, in June 1986, the San José office of UNO was the site of a meeting attended by Fabio Gadea, "Member of the Regional Directorate of UNO-Costa Rica"; Reynaldo Hernández, "Coordinator of the UNO Regional Directorate"; UNO Director Alfonso Robelo; and Lewis Tambs, United States Ambassador to Costa Rica. At the meeting Tambs "reaffirmed the decision of the United States to support the cause of the liberation of Nicaragua". (See photograph at Ann. E, Attachment 4, No. 6. See also Ann. J, Attachments 4, 5, 6.)

133. In addition, throughout 1986 and 1987, publication of the two pro-*contra* supplements to San José newspapers, *Nicaragua Hoy* and *Liberación*, and their appeals for military action against the Government of Nicaragua, continued. One article in *Nicaragua Hoy* in June 1986, for example, quoted remarks by FDN military commander Enrique Bermúdez delivered at a "graduation ceremony" for 1,000 "UNO-FDN commandos" which was supposedly held "in the mountains of Nicaragua". According to the article, Bermúdez: "emphasized the importance of the UNO-FDN alliance as the only way to achieve the liberation of Nicaragua". (Ann. E, Attachment 4, No. 5.)

134. The military activities of *contra* forces operating from Costa Rican soil also continued through 1986 and into 1987. During 1986, at least 10 *contra* camps remained in active operation in Costa Rica. They are identified in Ann. C, Attachment 5, Table 1. As of February 1987, *contra* camps in Costa Rica were located in Lomas del Valle, Buena Vista, La Unión, Cerro El Hucha, Conventillo, Upala, and Hacienda El Murciélago. (Ann. C, Attachment 5, Table 1.) Attacks waged against Nicaraguan territory from Costa Rica during 1986 included the following:

> On 11 January 1986, a group of armed men operating from Costa Rican territory attacked the Nicaraguan border post of Sarapiqui from Costa Rican territory, using mortars and rifle fire. (Ann. A, Attachment 240 (Diplomatic Note of Nicaragua).)
>
> On 16 January two helicopters of the Nicaraguan Air Force overflying the sectors of Sarapiqui and Boca de San Carlos in Nicaragua were

attacked with rifle fire by mercenary forces located on Costa Rican territory. Both helicopters were damaged. Pilot Lt. Enrique López Amador and co-pilot Norman Paguaga Moncada were wounded. Both helicopters landed on Nicaraguan territory. (Ann. A, Attachment 241 (Diplomatic Note of Nicaragua).)

On 17 January a group of armed men attacked the border post of Sarapiqui from a Costa Rican Rural Guard post. They used rifle fire, 50 mm machine guns and 75 mm cannon. (Ann. A, Attachment 242 (Diplomatic Note of Nicaragua).)

On 25 January a Nicaraguan Air Force helicopter which was on a mission to resupply the Nicaraguan border post of La Penca was attacked from Costa Rican territory with rifle fire. The helicopter was damaged. (Ann. A, Attachment 247 (Diplomatic Note of Nicaragua).)

On 28 January an airplane coming from Costa Rica machine-gunned Nicaraguan positions in the vicinity of a Nicaraguan border post in the San Juan River Delta sector. (Ann. A, Attachment 249 (Diplomatic Note of Nicaragua).)

On 11 February *contras* using a border post of the Costa Rican Rural Guard fired on the Nicaraguan border post located in the sector of El Sarampión, Río San Juan. Rifles, machine guns, and 57 mm cannon were used in the attack. (Ann. C, Attachment 1.)

On 11 February one Nicaraguan was wounded when a group of *contras* attacked, from Costa Rican territory, the Nicaraguan border post in the sector of the San Juan River Delta. (Ann. C, Attachment 1.)

On 16 April Nicaraguan troops located in the vicinity of Border Marker No. 12, 11 kilometers south-east of San Carlos, were attacked by armed men from Costa Rican territory using rifle fire, 81 mm mortars and M-79 grenade launchers. (Ann. A, Attachment 255 (Diplomatic Note of Nicaragua).)

On 21 April a group of individuals hijacked the *Promar 36*, a civilian ship of Nicaraguan registry, near Monkey Point, on the Atlantic coast of Nicaragua. The ship and its crew were taken to Costa Rica. (Ann. A, Attachment 257 (Diplomatic Note of Nicaragua).)

On 22 April a group of armed men operating from Costa Rican territory attacked a civilian boat near "Sombrero de Cuero" Island, 37 kilometers from San Carlos, Nicaragua. One woman was wounded and one person was reported missing. (Ann. A, Attachment 258 (Diplomatic Note of Nicaragua).)

On 29 May a group of armed men used mortars to attack the Nicaraguan border town of San Juan del Norte from Costa Rican territory. (Ann. A, Attachment 260 (Diplomatic Note of Nicaragua).)

On 1 June a group of some 15 persons wearing the uniform of the Costa Rican Civil Guard attacked the Nicaraguan observation post of Las Conchitas, 10 kilometers south-east of Peñas Blancas, using FAL and AK rifles. (Ann. A, Attachment 261 (Diplomatic Note of Nicaragua).)

On 19 August armed men operating from Costa Rican territory used 75 mm mortars to attack a Nicaraguan border post located 23 kilometers south-east of El Castillo. (Ann. A, Attachment 265 (Diplomatic Note of Nicaragua).)

135. During 1986, *contras* who had entered Nicaragua regularly received supplies through airdrops from flights over Costa Rican territory as well as flights that had used airfields in Costa Rica itself. A C123K cargo plane shot down in southern Nicaragua on 5 October 1986 had flown from Ilopango Air Base in El

Salvador to southern Nicaragua, taking it over Costa Rica. The aircraft was laden with military supplies intended for UNO forces inside Nicaragua. The surviving crew member, a United States citizen named Eugene Hasenfus, confirmed these facts in sworn testimony at his trial in Nicaragua on 16 October 1986. (Ann. G, Attachment 1. See also Ann. I, Attachments 50, 52.) Hasenfus also testified that he had previously participated in five similar flights, successfully dropping arms, ammunition and other supplies to *contra* forces inside Nicaragua, before the 5 October flight was shot down. *(Id.)* He also confirmed, in interviews with the press, that earlier in 1986 he had flown supply missions using the airbase at Santa Elena peninsula. (Ann. I, Attachment 52.)

136. CIA Station Chief Fernandez also confirmed that numerous supply flights for the *contras* in Nicaragua came from and/or flew over Costa Rica in 1986. In his testimony to the United States Congress, Fernandez described nine such supply drops occurring from April through September 1986. (Ann. F, Attachment 3 (Testimony of Mr. Fernandez, pp. 57-67).) Fernandez further testified that aircraft involved in the *contra* supply operations landed for refueling at a commercial airport ("[Deleted] International Airport") in Costa Rica on at least two occasions in May and June 1986. (*Id.*, pp. 78-80; see also Ann. F, Attachment 3 (Testimony of Mr. Tambs, p. 18-2).) Moreover, logs recovered from the wreckage of the C123K aircraft shot down over Nicaragua in October 1986 revealed that a co-pilot named Wallace Blaine Sawyer, who was killed on that flight, had been aboard two flights earlier in 1986 that had used a commercial airport in San José. (Ann. I, Attachments 51, 60.) Ambassador Tambs confirmed that such use of the commercial airport had to be cleared by airport officials. (Ann. F, Attachment 3 (Testimony of Mr. Tambs, p. 18-2).)

137. Mr. Fernandez personally assisted with these *contra* supply operations and reported on them to his superiors in Washington. His role was to relay information between the southern front commanders and the "private benefactors" working under the supervision of Lt. Col. North who operated the flights, to pinpoint locations for the supply drops and to help avoid encounters with Nicaraguan forces. (Ann. F, Attachment 3 (Testimony of Mr. Fernandez, pp. 52-55, 67-68).) Thus, for example, he cabled Lt. Col. North about the fate of "an L-100 aircraft that delivered 20,000 pounds of lethal material to the southern front commanders on or about April Tenth", in a memorandum dated 12 April 1986. (*Id.*, p. 61.) In this memorandum, Fernandez reported on both the April 10 airdrop, and plans for future air and sea deliveries to the *contras*:

> "Per UNO South Force drop successfully completed in [illegible] minutes. . . . Our plans during next 2-3 weeks includes air drop [deleted] maritime deliveries NHAO [Nicaraguan Humanitarian Assistance Office of the United States Department of State] supplies to same, NHAO air drop to UNO South, but w/certified air worthy aircraft, lethal drop to UNO South, [deleted] visit to UNO South Force with photogs, UNO newspapers, caps and shirts, and transfer of 80 UNO/FARN recruits [deleted] carrying all remaining cached lethal materiel to join UNO South Force . . ." (Ann. F, Attachment 3 (Exhibit to Testimony of José Fernandez identified only as TC "W 12 April 1986").)

138. Additional information on the maritime component of the resupply operation was reported in a separate cable to North dated 7 April 1986. In that memorandum, Fernandez reported that "the local port officials are aware of the operation and approve providing they don't get caught with arms . . .". (Ann. F, Attachment 3 (Exhibit to Testimony of Robert W. Owen) (Exhibit RWO-15).)

139. Fernandez made clear in his 12 April cable to North that the objective of all of these operations was to bring about the "creation of a 2,500-man force which can strike northwest and link up with quiche to form solid southern force. Likewise, envisage formidable opposition on Atlantic Coast resupplied at or by sea." He concluded: "realize this may be overly ambitious planning, but with your help, believe we can pull it off". (Ann. F, Attachment 3 (Testimony of Mr. Fernandez, p. 174).)

140. By late 1986, the *contras'* southern front had in fact been built up to a force of between 1,600 and 2,800 men, according to Ambassador Tambs. (Ann. I, Attachment 63.) Some 56 separate *contra* mobilizations from Costa Rica and encampments on Costa Rican territory had been reported between January 1985 and 21 December 1986 and, as noted earlier, at least 10 *contra* bases remained active at the end of 1986. (Ann. C, Attachment 5, Table 1.) As a result, Ambassador Tambs testified that by the time he left his post in Costa Rica in January 1987, he had succeeded in establishing an aggressive southern front against Nicaragua. (Ann. F, Attachment 3 (Testimony of Mr. Tambs, pp. 7-1, 18-1, 29-2). See also, Ann. F, Attachment 3 (Testimony of Mr. Owen, p. 24-3.)

141. The Costa Rican Government's tolerance of *contra* activities on its territory has continued, even as this Memorial is being prepared. On 14 July 1987, the Costa Rican Director General of Civil Aviation, Carlos Viquez, belatedly admitted the existence of a network of airstrips along the country's northern border with Nicaragua, claiming they had just been "discovered". Director General Viquez stated that the Government would investigate the possibility that these airstrips were being used by counter-revolutionaries seeking to overthrow the Government of Nicaragua. (Ann. I, Attachments 66, 67.) Nevertheless, on 20 July 1987, an airplane coming from Costa Rica dropped a small paratroop team and their weapons in Chontales province of Nicaragua, approximately 125 miles south-east of Managua. While the paratroopers themselves escaped, the Nicaraguan armed forces captured their weapons, including a United States Government supplied Redeye anti-aircraft missile, with serial number M41A3. These advanced-technology, heat-seeking missiles are now used by *contra* forces to shoot down Nicaraguan Government aircraft, and represent a grave threat to civil aviation as well. Their use in Nicaragua represents a serious escalation of the war effort to support the *contras*. (Ann. I, Attachment 68.)

PART TWO

BREACH OF THE DUTY OF NON-INTERVENTION

141 A. The norm prohibiting intervention by one State in the internal or external affairs of another is fundamental in contemporary international law. It is a foundation stone second in importance only to the prohibition against the use of force. Like the principle of non-use of force, its power and validity rest not only on positive expression in the United Nations Charter or on any other single source of international law, but on all combined. It is a principle of general international law. It is reiterated or reflected in countless separate international agreements, declarations, resolutions and other acts. It is embodied in the great constitutive charters of the United Nations and the Organization of American States.

142. The non-intervention principle is implicit in the central structural characteristic of the modern international system, the sovereign equality and independence of States. Judge Sette-Camara, in his separate opinion in *Nicaragua* v. *United States*, suggested that it is a rule of *jus cogens*:

> "As far as non-intervention is concerned, in spite of the uncertainties which still prevail in the matter of identifying norms of *jus cogens*, I submit that the prohibition of intervention would certainly qualify as such, if the test of Article 53 of the Vienna Convention on the Law of Treaties is applied." (*Nicaragua* v. *United States, supra*, p. 199. See also C. Chaumont, 55 *Annuaire de l'Institut de droit international* 580 (1973).)

143. The content of the norm also is derived not from any single source of law, but by a continuous interaction among them. The Charter provisions draw on prior general law, and the practice and experience with the principle under the Charter's feed back into the development of the customary norm. These in turn are recapitulated, codified, and elaborated in bilateral and multilateral conventional instruments — themselves evidence of State practice — and solemn declarations of international assemblies — themselves indications of *opinio juris*. This process of continuing iteration between general international law and conventional law is no novelty in the progressive development of principles of contemporary international law. In *Nicaragua* v. *United States* itself, the Court took the occasion to consider and elucidate the subtle and complex relationships between general international law and parallel Charter provisions, in relation to the very norm of non-intervention here under discussion. (See *id.*, pp. 93-97.) This case presents another instance of such interaction.

144. It is the submission of Nicaragua that this norm, whatever its source and however defined, prohibits intervention of any State in the affairs of another:

(a) directly by use of force against the second State,
(b) indirectly by providing assistance and support to forces conducting military or paramilitary activities against the second State, or
(c) by acquiescence in the use of its territory by irregulars or armed bands as a base for recruitment, training, logistical support or political backing for

military or paramilitary activities against the second State seeking to coerce or overthrow the government of that State.

Nicaragua submits that Costa Rica has violated its duty of non-intervention in all three of these main aspects.

145. Chapter III, immediately following, will demonstrate that the principle of non-intervention as defined above, is to be found in the same essential features in all sources of international law — general international law, the Charters of the UN and the OAS, and bilateral and multilateral agreements in force between the parties. Chapter IV will apply the law derived from this analysis to the facts developed in Part One, thus establishing the pervasive violations by Costa Rica asserted in the Application.

CHAPTER III. THE DUTY OF A STATE NOT TO INTERVENE IN THE AFFAIRS OF ANOTHER IS A FUNDAMENTAL PRINCIPLE OF INTERNATIONAL LAW

A. General International Law

146. It is no longer open to question that the principle of non-intervention is an element of general international law. The proposition is established authoritatively and categorically by the judgment of the Court in *Nicaragua* v. *United States*:

> "The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed: 'Between independent States, respect for territorial sovereignty is an essential foundation of international relations' (*I.C.J. Reports 1949*, p. 35), and international law requires political integrity also to be respected. Expressions of an *opinio juris* regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find. Of course, statements whereby States avow their recognition of the principles of international law set forth in the United Nations Charter cannot strictly be interpreted as applying to the principle of non-intervention by States in the internal or external affairs of other States, since this principle is not, as such, spelt out in the Charter. But it was never intended that the Charter should embody written confirmation of every essential principle of international law in force. The existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the sovereign equality of States. A particular instance of this is General Assembly resolution 2625 (XXV), the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States." (*Id.*, p. 106.)

147. The subsequent paragraphs of the Court's judgment set out the evidence of both State practice and *opinio juris* supporting its conclusion. (*Id.*, pp. 107-110.) Nevertheless a recapitulation of the history of the doctrine and the evolution of its content is appropriate.

148. The rule originated on the American continent. Long ago, the Court itself characterized it as "one of the most firmly established traditions of Latin America, . . ." (Colombian-Peruvian *Asylum* Case, *Judgment of 20 November 1950, I.C.J. Reports 1950*, pp. 266, 285.) The opinions of the authors agree: "The principle of non-intervention . . . had its origins in the international law of the American States . . ." (E. Jiménez de Aréchaga, "General Course in Public International Law", 159 *Hague Recueil* 111 (1978-I); see also, e.g., P. B. Potter, "L'intervention", 32 *Hague Recueil*, pp. 634 ff. (1930-II); A. v. W. Thomas and A. J. Thomas, *Non-Intervention — The Law and Its Import in America*, p. 55 (Dallas, 1956);

C. Rousseau, *Droit international public. Les relations internationales*, Vol. IV, p. 38 (Paris, 1980).

149. This provenance is, perhaps, of special signification in the present case in which both of the parties are Latin American States and heirs to its legal tradition. But whatever its origins, the principle is now universal and the most eminent authorities unanimously acknowledge it as a self-evident customary norm. (See, e.g., A. Rivier, *Le droit international*, Vol. I, para. 108, Vol. III, para. 1298 (Paris, 1886); P. Fauchille, *Traité de droit international public*, pp. 538 *et seq*. (Paris, 1922); E. C. Stowell, *Intervention in International Law*, p. 321 (Washington, 1921); and "La théorie et la pratique de l'intervention", 40 *Hague Recueil* 123 (1932-II); cf. A. v. W. Thomas and A. J. Thomas, *supra*, pp. 216 ff. (Dallas, 1956); G. Fitzmaurice, "General Principles of International Law", 92 *Hague Recueil* 176 (1957-II); D. P. O'Connell, I *International Law*, pp. 299-300 (London, 1970); J. L. Brierly, *The Law of Nations*, p. 402 (6th ed., H. Waldock, Oxford, 1963); S. M. Schwebel, "Aggression, Intervention, and Self-Defence", 136 *Hague Recueil*, pp. 452-454 (1972-II); G. I. Tunkin, *Theory of International Law*, pp. 115-116, 437-440 (Butler Translation, London, 1974); R. Ago, 56 *Annuaire de l'Institut de droit international* 154 (1975); E. Jiménez de Aréchaga, *supra*, pp. 111-116; C. Rousseau, *supra*, pp. 37-39 (Paris, 1980); O. Schachter, "General Course on Public International Law", 178 *Hague Recueil* 160 ff. (1982-V); M. Virally, "Cours general de droit international public", 183 *Hague Recueil* 110 (1983-V).)

150. Although he admitted exceptions, Oppenheim constantly referred to the principle of non-intervention as a basic rule. (See *International Law — A Treatise*, p. 305 (8th ed., 1955).)

151. There is also substantial agreement as to the content of the norm. It is axiomatic that any unjustified use of armed force by one State against another is an intervention. (*Nicaragua* v. *United States, supra*, p. 108.) It is also established that assistance by a State to armed bands operating from its territory against another State is an intervention. (*Id.*, pp. 118-119.) The Court's holding in that case draws on and confirms the definition in the Declaration on "Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" (GA res. 2625 (XXV) (1970), *UNGAOR, Twenty-fifth session, Supp. No. 18*, A/8082, p. 21, discussed *infra*, paras. 159, 160). Under *"The principle that States shall refrain in their international relations from the threat or use of force"*, the Declaration subsumes the following:

> "Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
>
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."

152. In Part Three, *infra*, Nicaragua submits that the activities of Costa Rica set forth in the Application and in Part One of this Memorial constitute a use of force against Nicaragua in violation of these principles. Under the rule that unlawful use of force is *ipso facto* intervention, these same actions also violate the customary law prohibition against intervention.

153. The Court has held, however, that *any* assistance by a State to armed bands or irregulars present upon its territory and carrying out operations against

another State, even though it may fall short of a use of force, is nevertheless an intervention prohibited by international law. Thus, in discussing the activities of the United States in support of the *contras*, the Court said:

> "In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the *contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua*, as will be explained below, does not in itself amount to a use of force." (*Nicaragua* v. *United States, supra*, p. 119 (emphasis added).)

In its discussion of the violations of the duty of non-intervention by the United States, the Court expanded on this conception:

> "The Court considers that in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by one State in the internal affairs of the other, whether or not the political objective of the State giving such support and assistance is equally far-reaching." (*Id.*, p. 124.)

154. It is equally clear that a State's failure to prevent the use of its territory as a base for hostile activities against its neighbor is an intervention. Judge Ago, as Rapporteur of the International Law Commission on the responsibility of States, describes as follows the obligation of a State not to tolerate on its territory the organization and training of groups whose aim is the subversion of a neighboring State:

> "Here the direct object of the obligation is not to prevent the occurrence of an attack or other event injurious to the Government from occurring in the territory of that State. The obligation requires, within the framework of mutual respect between independent sovereign entities, that the State should not allow an organization hostile to a foreign government to be established within its own frontiers and to engage there in action aimed at overthrowing the latter Government by violence. . . . It is thus clear that, in this case, there is a breach of the obligation, solely by reason of the fact that the authorities tolerated the establishment of the organization in question in the territory of the State and did not dissolve it as soon as they knew of its existence and its aims. It is thus possible to conclude that this breach exists and to bring out its consequences without depending, as a subsequent condition, on the fact of the subversive organization's having succeeded in carrying out attacks in a foreign territory, provoking subversion there and so forth." (*Yearbook of the International Law Commission*, 1978, Vol. II, Part One, para. 15, p. 36; see also, e.g., H. Lauterpacht, "Revolutionary Activities by Private Persons against Foreign States", 22 *Am. J. Int'l Law* 126 (1928); G. Fitzmaurice, *supra*, at 177; D. Schindler, *Annuaire de l'Institut de droit international* 471 (1973).)

There is no need to burden the Court with repetitive quotations from the authorities. But perhaps an exception can be made for the analysis of Thomas and Thomas, whose comprehensive work, *Non-intervention — The Law and Its Import in the Americas, supra*, has special weight in the Western Hemisphere context and deals at some length with the question of a State's failure to prevent incursions from its territory against another. The authors begin their discussion with a restatement of the general position that:

> "all nations owe other nations the duty to prevent their territory from being used as a base for hostile activities against the legitimate government of a third nation". (*Id.*, p. 217.)

The authors directly address the question whether mere passive toleration, even though admittedly an international delict, can:

> "be said to be an intervention, in view of the fact that intervention requires an intent on the part of the intervening state to impose its will on the other state, and failure to use due diligence might merely be an indication of complete disinterestedness and not of an intent to intervene?" *(Id.)*

Their answer is in the affirmative:

> "Where there is a duty on the part of a state to act and that state omits to do the act with knowledge of what the consequences of that omission will be, it intends the consequences just as truly as it intended to omit what it should have done. Its inaction or failure to use due diligence did permit its territory to be used by persons to foment civil strife in another state, this constitutes an act of intervention in the affairs of that state, and the motive for its inaction is unimportant." (*Id.* See also A. J. Thomas, "The Organization of American States and Subversive Intervention", in *Proceedings of the American Society of International Law*, 55th Meeting, 19 (1961) (characterizing as intervention cases in which "the government of one state has tolerated, instigated or encouraged seditious movements against the government of another state, such movements generally being led by political exiles opposed to the latter government").)

155. Beginning with the League of Nations in 1934, international organizations have regularly and consistently endorsed this principle in instruments defining and clarifying its content. In that year, the League Council declared:

> "that it is the duty of every State neither to encourage nor tolerate on its territory any terrorist activity with a political purpose; that every State must do all in its power to prevent and repress acts of this nature and must for this purpose lend its assistance to Governments which request it . . .". (12 *League of Nations Official Journal*, p. 1759, Part II (July-December 1934).)

156. The early work of the International Law Commission, reflecting the state of customary international law at the time of the adoption of the United Nations and OAS Charters also addressed the principle of non-intervention. The draft Declaration on Rights and Duties of States, formulated by the Commission in 1949, provides:

> "*Article 3*
>
> Every State has the duty to refrain from intervention in the internal and external affairs of any other State.
>
> *Article 4*
>
> Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife." (GA res. 375 (IV) (6 December 1949).)

The Commission in its Report notes that the text has a Latin American provenance, having been derived from Articles 5 and 22 of the Panamanian draft on which the work of the Commission was based, and that "the principle[s have] been enunciated in various international agreements". (Report of the International Law Commission covering its First Session 12 April-9 June 1949, *Yearbook of the ILC*, p. 287 (1949).)

157. Likewise, the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind included:

> "The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State." (Draft Code of Offences Against the Peace and Security of Mankind, ILC Report, Article 2 (6), *UNGAOR Supp. 9* (Ninth Session, 1954).)

158. The Report of the Special Rapporteur, M. J. Spiropoulos, makes it clear that:

> "if . . . the fomenting be due to private activities, the responsibility of the State officials of the State from which these private activities emanate will result from their *failure* to prevent or repress such fomenting by private activities". (Document A/CN.4/25, II *Yearbook of the International Law Commission* (1950), pp. 253, 262. (See also Article 11 of the new draft of Doudou Thiam including among the acts constituting crimes against the peace, "Interference by the authorities of a State in the internal and external affairs of another State". Report of the ILC on its 38th Session, 1986, A/41/10).)

159. In recent years the United Nations General Assembly has recognized the principle of non-intervention with increasing emphasis in a succession of resolutions and declarations. Foremost among these is the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations". (GA res. 2625 (XXV) (1970).) The Court has already remarked on the special weight to be accorded this resolution in defining the general international law norm of non-intervention. (*Nicaragua* v. *United States, supra*, p. 106.) The principle of non-intervention contained in the body of the resolution is described as "the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter". (GA res. 2625 (XXV) (1970).) In elaborating that duty the resolution states:

> "armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law.
>
> . . . no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed toward the violent overthrow of the regime of another State . . ." *(Id.)*

160. Paragraphs 2 and 4 of the "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of Their Independence and Sovereignty" (GA res. 2131 (XX) (21 December 1965)), are the sources of the language in resolution 2625 (XXV) (1970), quoted above. The relevant texts of the two resolutions are almost identical.

161. The other United Nations resolutions on this subject use identical or very similar language:

Non-Interference in the Internal Affairs of States, GA res. 31/91 (12 January 1977), UN doc. A/Res./31/91 (1977):

> "3. *Denounces* any form of interference, overt or covert, direct or indirect, including recruiting and sending mercenaries, by one State or group of States and any act of military, political, economic or other form of intervention in the internal or external affairs of other States, regardless of the character of their mutual relations or their social and economic systems;
>
> . . .
>
> 5. *Calls upon* all States, in accordance with the purposes and principles of the Charter of the United Nations, to undertake necessary measures in order to prevent any hostile act or activity taking place within their territory and directed against the sovereignty, territorial integrity and political independence of another State."

Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, GA res. 36/103 (1981):

> "*Reaffirming*, in accordance with the Charter of the United Nations, that no State has the right to intervene directly or indirectly for any reason whatsoever in the internal or external affairs of any other State.
>
> . . .
>
> 2. The principle of non-intervention and non-interference in the internal and external affairs of other States comprehends the following rights and duties:
>
> . . .
>
> II
>
> *(a)* The duty of States to refrain in their international relations from the threat or use of force in any form whatsoever to violate the existing internationally recognized boundaries of another State, to disrupt the political, social or economic order of other States, to overthrow or change the political system of another State or its Government, to cause tension between or among States or to deprive peoples of their national identity and cultural heritage;
>
> *(b)* The duty of a State to ensure that its territory is not used in any manner which would violate the sovereignty, political independence, territorial integrity and national unity or disrupt the political, economic and social stability of another State; . . ."

Resolution 2625 (XXV) was adopted by consensus. There can be no doubt that it reflects *opinio juris* of the participating Governments. Resolution 2131 (XX) was adopted unanimously (with one abstention). In 1966, the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States said that the Declaration:

> "by virtue of the number of States which voted in its favor, the scope and profundity of its contents and, in particular, the absence of opposition, reflects a universal legal conviction which qualifies it to be regarded as an authentic and definite principle of international law". (*UNGAOR*, Annexes, v. III 74 (XXI) (1966).)

162. As already noted, in its judgment of 27 June 1986, the Court recognized the special significance of these resolutions in that they "set out principles which

the General Assembly declared to be 'basic principles of international law'". (*Nicaragua* v. *United States, supra*, p. 107.) The teachings of jurists also affirm that these resolutions represent codifications of existing customary law. (See, e.g., L. B. Sohn, "The Development of the Charter of the United Nations", in M. Bos (ed.), *The Present State of International Law*, pp. 50 ff. (Deventer, 1973); S. M. Schwebel, "Wars of Liberation as Fought in UN Organs", in J. N. Moore (ed.), *Law and Civil War in the Modern World*, p. 452 (Baltimore, 1974); E. Jiménez de Aréchaga, *supra*, pp. 12, 32.)

163. There can be no doubt that these resolutions constitute authoritative formulations of the general international law now in force.

B. The Charters of the Organization of American States and the United Nations

1. The Charter of the Organization of American States

164. The Charter of the Organization of American States represents the culmination of more than a century of effort by international lawyers and statesmen of the American States to curb intervention by one State in the affairs of another. According to J. M. Yepes, the principle of non-intervention "est comme l'épine dorsale du droit international au Nouveau Monde". (J. M. Yepes, "La contribution de l'Amérique latine au développement du droit international public et privé", 32 *Hague Recueil* 745 (1930).)

165. In this respect, the Charter is deeply marked by the special historic experience of the nations of the Western Hemisphere. To quote Dr. Yepes again, speaking in the ILC debate on the non-intervention provision of the draft Declaration on Rights and Duties of States:

> "The Latin American position with regard to intervention was the result of events which had taken place during the nineteenth century and the first three decades of the twentieth century. During that period, the Latin American countries had been the victims of a series of unilateral interventions by a large number of European nations and by the United States . . . All those events had created very strong opposition to unilateral intervention in Latin America which had consistently affirmed the principle of non-intervention; it was one of the main ideas underlying Latin-American legal thought." (International Law Commission, 1st session, 12th meeting, 28 April 1949, A/CN.4/SR.12, pp. 6-7.)

Article 18 (originally Article 15) of the Charter provides:

> "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prevents not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements."

Article 19 (originally Article 16) elaborates the non-intervention principle as follows:

> "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind."

166. The drafters of these Articles were working in the context of a long juridical history, especially rich in the Western Hemisphere, of efforts to curb intervention by one State in the affairs of another, both through the development of norms of general international law and through a series of conventional instruments in the American system specifically directed to the problem. The non-intervention provisions of the OAS Charter are a codification of the customary norms and an integrated and comprehensive statement of the provisions of the earlier Western Hemisphere conventional law. As Judge Fabela says:

> "These provisions, which are complementary, clearly define, as the basis of peaceful pan-American coexistence, the principle of non-intervention for which Latin America has always struggled, most especially since the Havana Conference (1928)[1]." (I. Fabela, *Intervencion*, p. 250 (Mexico, 1959).)

167. Thus, for example, the Charter text undertakes to resolve a number of issues of controversy and debate among jurists. In every case, the text comes down in favor of the more inclusive conception of intervention. It does not confine "intervention" to the use of armed force, but includes also "any other form of interference . . .". Article 19 expressly condemns "coercive measures of an economic or political character . . .". Intervention in the external as well as the internal affairs of another State is prohibited. And multilateral as well as unilateral intervention is covered.

168. It is widely recognized that these Articles comprise the broadest and most comprehensive formulation of the principle of non-intervention in any multilateral charter or instrument, certainly as of the time of the formation of the OAS in 1948. Therefore they should not be given a restrictive or grudging construction.

169. Since the OAS Charter in effect declares and codifies the customary international law norm, the discussion of the scope and content of that norm of non-intervention in section A above is equally relevant to the construction of Articles 18 and 19 of the OAS Charter. The identical conclusion as to the scope and content of the norm is derived from an analysis of the prior conventional law in the Western Hemisphere and subsequent applications and interpretations of the Charter by competent organs of the OAS.

170. The history of the evolution of the non-intervention provisions of the OAS Charter through a series of hemispheric instruments beginning in 1928 has often been told. (See, e.g., F. V. García-Amador, *The Inter-American System — Its Development and Strengthening*, xxv-xxii (New York, 1966); C. G. Fenwick, *The Organization of American States — The Inter-American Regional System*, pp. 54-87 (1963); A. v. W. Thomas and A. J. Thomas, *The Organization of American States* (Dallas, Southern Methodist University Press, 1963), pp. 158-161. It need only be summarized briefly here. The first effort to secure a formal agreement on non-intervention among all the American States occurred at the Sixth International Conference of American States in Havana in 1928. The newly formed Commission of Jurists presented a draft treaty on Rights and Duties of States containing a non-intervention provision: "No state has the right to interfere in the internal affairs of another." (See Thomas and

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[1] Original Spanish text: En tales preceptos, que se complementan entre sí, queda definido, como base de la convivencia pan-americana, el principio de la no intervención por el que la América Latina vino luchando desde siempre, pero de manera muy significativa desde la Conferencia de La Habana (1928).

Thomas, *The Organization of American States, supra*, p. 59.) The proposal was defeated after long and acrimonious debate due to the opposition of the United States. As part of the same enterprise, however, the Commission of Jurists proposed a Convention on the Duties and Rights of States in the Event of Civil Strife, which was adopted by the Conference. (See *The International Conferences of American States 1889-1928*, p. 435 (New York, 1931).)

171. This Convention proclaimed the fundamental obligation of the contracting States:

> "To use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife." *(Id.)*

172. This provision embodies the general international law norm discussed above. The Convention has remained a permanent part of the array of Inter-American treaties giving conventional form to the principle of non-intervention.

173. In 1933 at Montevideo, the Latin American States gained the success that eluded them in Havana. The Seventh Conference adopted a Convention on Rights and Duties of States. Article 8 closely tracked the formula rejected five years earlier: "No state has the right to intervene in the internal or external affairs of another." (*The International Conferences of American States*, First Supplement, 1933-1940, p. 122 (Washington, 1940).) This time, the United States signed, although subject to a long and somewhat opaque reservation. Nicaragua signed the Convention at Montevideo, and both Nicaragua and Costa Rica ratified soon thereafter. (*International Conferences of the American States*, 1st Supp., 1933-1940, pp. 123, 121, n. 1.) In 1936, at the Inter-American Conference for the Maintenance of the Peace at Buenos Aires, an Additional Protocol Relative to Non-Intervention was presented and adopted without reservation by all participants. It provides:

> "The High Contracting Parties declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties." (*Id.*, p. 191.)

The Declaration of American Principles adopted by the Eighth Conference at Lima proclaims that "The intervention of any State in the internal or external affairs of another is inadmissible". (*Id.*, p. 309.) And the Act of Chapultepec, adopted at Mexico City in 1945, recited that:

> "The American states have been incorporating in their international law, since 1890, by means of conventions, resolutions and declarations, the following principles:
>
> . . .
>
> *(b)* The condemnation of intervention by one State in the affairs of another." (*The International Conferences of the American States*, 2nd Supp. 1942-1954, p. 66 (Washington, 1958).)

174. Articles 15 and 16 of the Charter of the Organization of American States signed at Bogotá in 1948 (now Articles 18 and 19) mark the culmination and integration of this long development of Western Hemisphere non-intervention law. We can see the development and refinement of the text from the simple 13 word sentence at Havana through Montevideo and Buenos Aires to the final version at Bogotá.

175. The non-intervention Articles are included in Chapter III of the Charter entitled Fundamental Rights and Duties of States. This Chapter as well as those on Purposes and Principles were introduced into the Charter over the opposition of the United States. Mexico took the lead in urging a "comprehensive document incorporating principles and standards of conduct and policies previously proclaimed in inter-American documents". (C. G. Fenwick, *The Organization of American States*, p. 81 (Washington, 1963).) The principle of non-intervention, including its corollaries embodied in the Convention on the Duties and Rights of States in the Event of Civil Strife, were prominent among those "principles, policies and standards of conduct previously proclaimed in inter-American documents". (*Id.*, p. 85; see also Thomas and Thomas, *The Organization of American States, supra*, p. 63, Thomas and Thomas, *Non-Intervention, supra*, p. 115.) García-Amador says:

> "Outstanding in this declaratory part of the Charter is Chapter III which defines the 'fundamental rights and duties of States' with a scope and precision unparalleled in any other conventional instrument." (García-Amador, *supra*, p. xxxii.)

176. The applications and interpretations of the Charter by competent organs of the OAS can be regarded as authoritative statements of the meaning of these provisions. All of these concur in defining the failure of a State to prevent the use of its territory as a base for attacks against a neighbor as impermissible intervention.

177. Soon after the Charter came into force, the OAS Council was faced with a dispute between these same two parties, Costa Rica and Nicaragua. Then, Costa Rica initiated the complaint. The Costa Rican Ambassador:

> "accuse[d] the Government of Nicaragua of having violated the territorial integrity of Costa Rica, and threatened its sovereignty and political independence *by tolerating, encouraging, and aiding a conspiracy concocted in Nicaragua* in order to overthrow the Costa Rican Government by force of arms, and finally by *making available to the conspirators the territory and material means* that enabled them to cross the border and invade Costa Rican soil". I *Applications of the Inter-American Treaty of Reciprocal Assistance, 1948-1956*, p. 21 (Washington, 1957) (emphasis added) (hereinafter "*Applications*").)

The Committee of Information reported to the Council that:

> "[T]here is not the slightest doubt of the failure of the Nicaraguan Government to take adequate measures to prevent the revolutionary activities directed against a neighboring and friendly country from being carried out." (*Id.*, p. 26.)

Accordingly the Council resolved:

> "That the Nicaraguan Government could and should have taken adequate measures at the proper time for the purpose of preventing *(a)* the development, in Nicaraguan territory, of activities intended to overthrow the present regime in Costa Rica, and *(b)* the departure from Nicaraguan territory of revolutionary elements." (*Id.*, p. 28.)

Meanwhile, Nicaragua had entered a similar counter-complaint against Costa Rica, as to which the Council made a similar finding. *(Id.)* The Council Resolution continued by requesting:

> "that both governments, by every available means, faithfully observe the principles and rules of non-intervention and solidarity contained in the various inter-American instruments signed by them". *(Id.)*

178. A Commission of Military Experts was appointed to assist in the effective fulfillment of the Resolution. (*Id.*, p. 30.) As a result of this incident and pursuant to the recommendation of the Commission and a Council Resolution, Nicaragua and Costa Rica, in 1949, concluded a bilateral Treaty of Amity looking toward "the constant application by both governments of the principles of non-intervention and continental solidarity". *(Id.)*

179. Again in January 1955, Costa Rica brought a complaint against Nicaragua to the OAS Council. In the initial letter to the Chairman of the Council, Costa Rica listed as its most serious concern:

> "the facilities that are being granted in Nicaragua to internal and external enemies of Costa Rica to organize military units and to plot against the stability of Costa Rican democratic institutions and the peace and security of the nation". (*Id.*, p. 160.)

180. The OAS appointed an Investigating Committee, which through on the scene investigations was able to establish that the rebels, mostly of Costa Rican nationality and supported by several light aircraft, were attacking points in northern Costa Rica. Ultimately, the rebels were driven back to Nicaraguan territory, where they were interned. The Committee reported to the OAS that "A substantial number of the rebel forces and the war materials used by them, whatever their origin, entered by way of the Costa Rican-Nicaraguan frontier". (*Id.*, p. 187.) It did not make any finding that the Government of Nicaragua had participated actively in the supply organization of the rebel forces. Nevertheless, the OAS Council adopted a resolution:

> "condemn[ing] the acts of intervention of which Costa Rica is victim and call[ing] attention to the grave presumption that there exist violations of international treaties in force". (*Id.*, p. 168.)

181. In a case brought before it by Haiti, the OAS Council passed a resolution requesting:

> "the Government of the Dominican Republic to take immediate and effective measures to prevent government officials from tolerating, instigating, encouraging, aiding or fomenting subversive or seditious movements against other governments". (*Id.*, p. 125.)

With respect to the Dominican Republic's counter-complaint against Cuba and Guatemala, the Council resolved:

> "To request the Governments of Cuba and Guatemala to adopt adequate measures so that they will not permit the existence in their territories of groups of nationals or foreigners organized on a military basis with the deliberate purpose of conspiring against the security of other countries and to request also the Governments of Cuba, Guatemala, and the Dominican Republic to take adequate measures to ensure absolute respect for the principle of non-intervention . . ." (*Id.*, p. 127.)

182. In all of these cases the OAS Council and its subordinate bodies acted on the basis that "intervention" did not require active participation by the accused State in the hostile actions directed against the complaining State. Failure to prevent or suppress such actions on the territory of the accused State was enough to violate the principle of non-intervention.

183. The Inter-American Juridical Committee has taken a similar view of the content of the principle of non-intervention embodied in the OAS Charter. In 1959, the Fifth Meeting of Consultation of the Ministers of Foreign Affairs, seeking to enhance "[t]he strict observance, by the American republics, of the contractual obligations not to intervene in the internal or external affairs of other states", charged the Commission with preparing: "A draft instrument listing the greatest possible number of cases that constitute violations of the principle of non-intervention." (Inter-American Juridical Committee, Instrument Relating to Violations of the Principle of Nonintervention, CIJ-51, p. 1 (General Secretariat, Organization of American States, February 1959).) The list prepared by the Commission in response to this request included:

> "Permitting, in the areas subject to its jurisdiction, any person, national or alien, to participate in the preparation, organization, or carrying out of a military enterprise that has as its purpose the starting, promoting, or supporting of rebellion or sedition in an American state, even though its government is not recognized. The aforesaid participation includes the following acts:
>
> (1) The contributing, supplying, or providing of arms and war material;
>
> (2) The equipment, training, collecting, or transporting of members of a military expedition;
>
> (3) The provision or receipt of money, by any method, intended for the military enterprise." (*Id.*, pp. 16-17.)

Note that although subparagraphs (1), (2), and (3) define "participation", the act condemned by the Commission is not "participation" but "[p]ermitting . . . any person . . . to participate".

184. Finally, the OAS General Assembly adopted the same view of intervention as proscribed in the OAS Charter in its Resolution on Strengthening of the Principles of Non-Intervention and the Self-Determination of Peoples and Measures to Guarantee Their Observance. (AG/res. 78 (II-0/72) (21 April 1972).) The preambular clause states that acts of direct and indirect intervention "constitute a flagrant violation of the principles of non-intervention and self-determination of peoples established in the Charter of the Organization of American States". And the operative portion:

> "RESOLVES:
>
> . . .
>
> 3. To reaffirm the obligation of [member] states to refrain from organizing, supporting, promoting, financing, instigating, or tolerating subversive, terrorist, or armed activities against another state . . ."

185. It follows that, even apart from its intervention by use of force against Nicaragua or by its active assistance to the *contras*, Costa Rica has violated its obligation under Article 18 of the OAS Charter by failing to prevent and suppress the operation of those forces from bases within its territory.

2. The United Nations Charter

186. Unlike the OAS Charter, the Charter of the United Nations contains no express prohibition against intervention in the affairs of another State. The Court itself has remarked that "this principle is not, as such, spelt out in the Charter". (*Nicaragua* v. *United States, supra*, p. 106.)

187. The Court's language suggests, however, that the principle may be implicit in the Charter. The obligation of non-intervention is a necessary corollary of "the principle of equal rights and self-determination of peoples" in Article 1 (2) and "the principle of the sovereign equality of all its Members" on which the Organization is based, according to Article 2 (1). (See *Nicaragua* v. *United States, supra*, p. 106.) In addition, Article 2 (7) prohibits the United Nations from intervening in matters that are essentially within the domestic jurisdiction of any State. It would seem strange to preclude the Organization from taking action collectively that was lawful for individual members.

188. Former President Jiménez de Aréchaga supports this view:

> "While the Charter contains no provision dealing explicitly with the principle of non-intervention by States, that principle must be regarded as implicit in it. The embodiment of this principle follows from the fact that, by proclaiming the sovereign equality of States, the Charter prohibits one State from interfering in the affairs of another State. Sovereign equality would be meaningless if States were entitled to intervene in the domestic affairs of other States. The legal concept of non-intervention may be regarded as springing also from the respect for the political independence of States and the principle of self-determination, which encompasses the right of peoples to choose their own political, economic, social and cultural systems. It is true that Article 2 (7) prohibits intervention by the Organization but, since the Charter cannot permit States to do what it prohibits the Organization itself from doing, such a prohibition must extend *a fortiori* to member States in their relations with other States. Consequently, the introductory sentence of Article 2, enjoining the Organization and its members to 'act in accordance with the following principles' cannot be interpreted as meaning that some of the principles apply to the Organization and others to the member States: both the member States and the Organization are obliged to act in accordance with all the principles of the Charter, including that of non-intervention." (E. Jiménez de Aréchaga, 159 *Hague Recueil* 112 (1978-I); see also M. Virally, 183 *Hague Recueil* 108 (1983-V); A. v. W. Thomas and A. J. Thomas, *The Organization of American States, supra*, p. 157.)

189. It is not surprising, then, that the United Nations has consistently acted on the basis that the duty not to intervene in the affairs of another State is a Charter obligation. Moreover, the review of the pertinent United Nations resolutions (*supra*, paras. 159-161) shows that the United Nations, like the OAS, has always taken a broad view of that obligation, including within its purview the duty of a State to prevent armed bands or irregulars from operating on its territory against another State.

190. It is not necessary, therefore, to repeat the substantive portions of those resolutions and declarations. Here we review them to establish the proposition that non-intervention is a Charter principle and that its breach is a Charter violation.

191. As noted above, foremost among these instruments is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. (GA res. 2625 (XXV) (1970).) The Court has already remarked on the special significance to be accorded this resolution. (*Nicaragua* v. *United Nations, supra*, pp. 101, 106.) Resolution 2625 states expressly that non-intervention is a Charter obligation. The title of the resolution invokes the Charter. The preambular clause recites that:

> "*the practice of any form of intervention not only violates the Charter*, but also leads to the creation of situations which threaten international peace and security, . . ." (emphasis added).

The principle of non-intervention contained in the body of the resolution is described as "the duty not to intervene in matters within the domestic jurisdiction of any State, *in accordance with the Charter*" (emphasis added).

192. The other United Nations resolutions on this subject follow the same pattern. (In each case, we have underscored the pertinent language indicating the foundation in the United Nations Charter of the non-intervention principle):

Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of Their Independence and Sovereignty, GA res. 2131 (XX) (1965):

> "*Preamble:*
>
> full observance of the principle of the non-intervention of States in the internal affairs of other States is essential to the fulfillment of the principles and purposes of the United Nations.
>
> direct intervention, subversion and all forms of indirect intervention . . . constitute a violation of the Charter of the United Nations.

Declaration on the Strengthening of International Security, GA res. 2734 (XXV) (1970):

> "*Calls upon* all States to adhere strictly . . . to the purposes and principles of the Charter, including . . . the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter; . . ."

Non-interference in the Internal Affairs of States, GA res. 31/91 (1977):

> "5. *Calls upon* all States, in accordance with the purposes and principles of the Charter of the United Nations, to undertake necessary measures in order to prevent any hostile act or activity taking place within their territory and directed against the sovereignty, territorial integrity and political independence of another State."

Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, GA res. 36/103 (Annex) (1981):

> "*Preamble:*
>
> *Reaffirming*, in accordance with the Charter of the United Nations, that no State has the right to intervene directly or indirectly for any reason whatsoever in the internal or external affairs of any other State.
>
> . . .
>
> *Considering* that full observance of the principle of non-intervention and non-interference in the internal and external affairs of States is of the greatest importance . . . for the fulfillment of the purposes and principles of the Charter [of the United Nations]."

193. It thus appears that the United Nations has consistently treated the principle of non-intervention as embodied in the Charter and a violation of the principle as a breach of the Charter. It has regarded the content of the principle as having the same latitude as the OAS and as identical with that of the customary norm. It includes not only use of force or assistance to others in the use of force

against a State, but the failure of a State to prevent its territory from being used for acts of intervention against another. It follows that acts of intervention in violation of general international law in breach of the OAS Charter are equally in violation of the United Nations Charter.

C. Multilateral and Bilateral Conventions in Force between the Parties

194. Conventional instruments in force between the parties specifically address the question of intervention in facts and circumstances like those revealed in this case. The oldest of these is the Convention on the Duties and Rights of States in the Event of Civil Strife, *supra*.

195. As noted above, paragraph 170, this Convention was part of a two-pronged effort to enact into positive law the principles of non-intervention espoused by the Latin American States. The general condemnation of intervention, which was in essence directed at the United States, failed because of United States opposition. But the provisions of the Convention on the Duties and Rights of States in the Event of Civil Strife would apply, as a practical matter, to the relations of the Latin American States among themselves. Thus the United States did not oppose it, and it was adopted by the Conference. Nicaragua and Costa Rica are both parties to the Convention[1].

196. The 1928 Convention is specifically directed to the types of activities revealed by the evidence in this case. The basic prohibitions of the Convention listed in Article I cover the very actions of Costa Rica of which Nicaragua complains in this case. The parties bind themselves:

> "First: To use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife.
>
> Second: To disarm and intern every rebel force crossing their boundaries, . . .
>
> Third: To forbid the traffic in arms and war material, except when intended for the Government . . .
>
> . . ." (*International Conferences of American States 1889-1928*, pp. 435-436 (New York, 1931).)

197. As the facts show, and as will be developed more fully in Chapter IV, *infra*, the actions of Costa Rica have flouted all three of these solemn treaty obligations. Especially important in the context of this case is the first obligation: "*to prevent*" the inhabitants of the State from participating in or preparing for civil strife in another State.

198. Although the title of the Convention refers to civil strife, it is not a prerequisite for the application of the Convention that a condition of civil strife (whatever that may mean) must be shown. The obligations are absolute in accordance with their terms. The provision requires the parties to prevent certain activities when undertaken for the purpose of "*starting* or promoting civil strife". Thus, it is clear that the obligations of the Convention attach before any civil strife is under way.

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[1] A Protocol to the Convention was opened for signature at the Pan American Union on 1 May 1957. F. V. García-Amador, *The Inter-American System — Its Development and Strengthening*, *supra*, pp. 404-406. It has been ratified by Costa Rica but not by Nicaragua.

199. The 1928 Convention played a central role in OAS consideration of the disputes between Nicaragua and Costa Rica in 1949 and 1956, discussed *supra*, paragraphs 177-180. In the first incident, the OAS Council treated the charges and countercharges of the disputes as implicating the provisions of the Convention. In his invitation to members of the Inter-American Commission of Military Experts, established by the Council to help resolve the crisis, the Chairman of the Council specifically invoked the Convention. (*Applications, supra*, p. 29.) In enumerating the acts that the Council feared might occur and in anticipation of which the Commission was established, he repeated *in haec verba* the language of parts First to Fourth of Article 1 of the Convention. (*Id.*, p. 30.)

200. The two bilateral treaties of friendship now in force between the parties derive from the 1949 and 1956 disputes. They were negotiated at the instance of the OAS in response to OAS Council Resolutions enacted to resolve the crises. Both agreements are based explicitly on the 1928 Convention and are designed to provide for the implementation of its provisions between the parties.

201. The 1949 bilateral treaty refers in its preamble to the OAS Council Resolution of 24 December 1948 (annexing the text) which requested:

> "that both governments by every available means, faithfully observe the principles and rules of non-intervention and solidarity contained in the various inter-American instruments signed by them". (*Id.*, p. 28.)

The core of the Treaty of Amity is found in Article IV, which provides:

> "The Governments of Costa Rica and Nicaragua likewise undertake to reach an agreement as to the best manner of putting into practice the provisions of the Convention on the Duties and Rights of States in the Event of Civil Strife, in cases contemplated by that Convention, so that it may be applied immediately whenever a situation of this kind arises, in the manner provided for in the said agreement, especially with respect to measures for the control and supervision of frontiers, as well as with respect to any other measure intended to prevent the organization or existence of any revolutionary movement against the Government of either of the two Parties in the territory of the other." (Pact of Amity between the Governments of the Republic of Costa Rica and Nicaragua, signed at Pan-American Union, 21 February 1949, *Applications, supra*, pp. 48, 49 (hereinafter 1949 Pact of Amity).)

202. By this bilateral agreement, the parties translated their obligations under the multilateral Convention into bilateral obligations *inter sese*. The special agreement contemplated by Article IV was not immediately concluded by the two countries. When a similar dispute arose in 1955, Costa Rica appealed again to the OAS Council. An Investigating Committee was appointed which recommended, *inter alia*, that the two Governments should "prepare and sign the Bilateral Agreement mentioned in Article IV of the [1949] Pact". (*Id.*, p. 188.) The Council adopted this recommendation in paragraph 1 of its Resolution of 24 February 1955. (*Id.*, p. 196.)

203. Pursuant to this resolution, the two countries, on 9 January 1956, concluded the "Agreement between the Governments of Nicaragua and Costa Rica in Compliance with Article IV of the Pact of Amity Signed on February 21, 1949". (*Applications, supra*, p. 205 (hereinafter 1956 Agreement).) This instrument lists the measures the parties must take to "put into practice" the provisions of the 1928 Convention. Detailed undertakings of the parties elaborate the obligations of the Convention.

204. Article III is the basic provision. Again, it is especially relevant to the facts of this case:

> "Each Party undertakes to take the necessary measures to prevent revolutionary movements against the other Party from being initiated or carried out in its territory.
>
> Each Party undertakes to take measures of every kind to prevent any person, national or alien, from any place within its jurisdiction, from participating or aiding in any subversive enterprise, terrorist act, or attempt against the Chief of State of the other Party, . . ." (*Id.*, p. 207.)

The Article imposes an affirmative obligation "to take measures to prevent" the enumerated acts. It is not enough to rest passively on lack of knowledge or information, although in the present case, there is no doubt that the Costa Rican authorities were well aware of the character and scope of the *contra* activities. The 1956 Agreement mandates an active, aggressive policy to search out such activities and put a stop to them.

205. The remainder of the Agreement spells out this basic obligation in additional detail. Article II calls for "surveillance of their common boundary as a means of preventing either arms or armed parties from crossing illegally from the territory of one of the Parties to that of the other . . ." and for exchange of information to that end. *(Id.)* Article IV defines "participation" as including the provision of funds, arms, training, recruitment, organization or transportation of persons. *(Id.)*

206. Article V is especially interesting. It incorporates the most important provisions of the Convention on Territorial Asylum (signed at Tenth Inter-American Conference, Caracas, 28 March 1954, Treaty Series No. 19 (Pan-American Union 1961)) into the 1956 Agreement, thus making them applicable between the parties, although Nicaragua has not ratified the Convention. The 1956 Agreement repeats verbatim the text of the incorporated Articles. Incorporated Articles VII and VIII have special relevance to the political activities of the *contra* organizations in San José. They provide:

> "Article VII. Freedom of expression of thought, recognized by domestic law for all inhabitants, may not be ground of complaint by a third state on the basis of opinions expressed publicly against it or its government by asylees or refugees, *except when these concepts constitute systematic propaganda through which they incite to the use of force or violence against the government of the complaining state.*
>
> Article VIII. No state has the right to request that another state restrict for the political asylees or refugees the freedom of assembly or association which the latter state's internal legislation grants to all aliens within its territory, *unless such assembly or association has as its purpose fomenting the use of force or violence against the government of the soliciting state.*" (*Id.*, p. 208 (emphasis added).)

A third Article of the Convention on Territorial Asylum, also incorporated in the 1956 Agreement, is of equal importance in connection with Costa Rica's failure to clear the *contras* out of the border zone:

> "Article IX. At the request of the interested state, the state that has granted refuge or asylum shall take steps to keep watch over, or to intern at a reasonable distance from its border, those political refugees or asylees who are notorious leaders of a subversive movement, as well as those against whom there is evidence that they are disposed to join it." *(Id.)*

207. As will be shown in the next Chapter, the acts and omissions of Costa Rica shown by the evidence are manifestly contrary to the stipulations in these bilateral treaties. Nicaragua also considers that by the repeated and pervasive character of these violations Costa Rica has denatured the fundamental significance of these bilateral treaties. The preambles of both treaties recite that their purpose is "to maintain the closest friendship and to strengthen the fraternal bonds which have historically characterized their relations . . ." (1949 Pact of Amity) and "to maintain the closest friendship between them, as befits two kindred and neighboring peoples . . ." (1956 Agreement). In its judgment in *Nicaragua* v. *United States*, the Court said:

> "There must be a distinction, even in the case of a treaty of Friendship, between the broad category of unfriendly acts and the narrower category of acts tending to defeat the object and purpose of the Treaty. That object and purpose is the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in the vague and general sense." (*I.C.J. Reports 1986*, p. 137.)

However, the Court went on to hold that:

> "there are certain acts of the United States which are such as to undermine the whole spirit of the bilateral agreement directed to sponsoring the friendship between the two States parties to it". (*Id.*, p. 138.)

The direct attacks perpetrated against Nicaragua by the United States, the mining of the ports, and the trade embargo were acts of this character.

208. In this case, "the specific fields provided for in the [t]reaty" are intervention and the various acts and omissions that are instances of intervention, under the detailed stipulations of the treaties themselves and the more general conventional and customary norms. Thus, the overall pattern of Costa Rican assistance, complicity and acquiescence in the political and military activities of the *contras* must *a fortiori* be taken as "undermining the whole spirit of the bilateral agreement". In this connection, the public appeal of Foreign Minister Gutierrez (see *supra*, para. 13), and of President Monge himself, to the United States Congress to renew aid to the *contras (id.)* take on special significance. They are certainly not calculated to "maintain the closest friendship and strengthen the fraternal bonds" between the two countries.

* *

209. It is ironic in a sense that the disputes between these two States three decades ago should play an important role in defining the law applicable to the current case. In 1948, Costa Rica accused the Government of Nicaragua:

> "of having violated the territorial integrity of Costa Rica, and threatening its sovereignty and political independence by tolerating, encouraging, and aiding a conspiracy concocted in Nicaragua to overthrow the Costa Rican Government by force of arms, and finally by making available to the conspirators the territory and the material means that enabled them to cross the border and invade Costa Rican soil". (*Applications, supra*, pp. 20-21.)

210. In its 1955 complaint, Costa Rica stated:

> "The succession of acts that may be called aggressive include the closing of the San Juan River to navigation by Costa Rican merchant vessels;

> defamation campaigns by the press, circulation of new items and tendentious official statements prophesying internal struggles in Costa Rica; . . . and still more serious, the facilities that are being granted in Nicaragua to internal and external enemies of Costa Rica to organize military units and to plot against the stability of Costa Rican democratic institutions and the peace and security of the Nation." (*Id.*, p. 160.)

211. Today the roles are reversed. Nicaragua could adopt practically word for word the complaints of Costa Rica against the Somoza dictatorship in 1948 and 1955. It was precisely to avoid a repetition of those incidents that the OAS Council reproved Nicaragua for its actions and that the 1949 Pact of Amity and the 1956 Agreement were concluded.

212. Costa Rica, by the general course of conduct disclosed in the evidence has defeated the object and purpose of those treaties. The next Chapter will demonstrate by a detailed review of the evidence, that Costa Rica, at the same time and by the same acts, has also violated the specific stipulations of the treaties, as well as the principles of non-intervention embodied in the Charters of the United Nations and the OAS and of general international law.

CHAPTER IV. THE FACTS ESTABLISHED IN PART ONE ABOVE CONSTITUTE MASSIVE AND PERSISTENT VIOLATIONS BY COSTA RICA OF ITS DUTY NOT TO INTERVENE IN THE AFFAIRS OF NICARAGUA

213. The facts recited in Part One of this Memorial, taken as a whole, add up to a classic case of wilful intervention by Costa Rica in the affairs of Nicaragua in violation of the norms of general international law, Charter provisions and treaty obligations discussed in Chapter III, *supra*. The evidence discloses a persistent pattern of extensive military attacks, beginning in 1982, along the border between Nicaragua and Costa Rica by armed bands of *contras* seeking the overthrow of the Nicaraguan Government. The groups conducting these attacks are based in Costa Rica, they are trained and supplied there, they launch their attacks from Costa Rican territory, and, after being repulsed, they retreat to that country, where they are given sanctuary to recuperate and repeat the process. Meanwhile, in San José, the political leaders of this subversive enterprise, maintain their headquarters, freely conduct political activities and disseminate propaganda in support of the military operations, and call repeatedly for the overthrow of the Nicaraguan Government by force and arms. These activities are carried out with the full knowledge and sometimes the active assistance of the Costa Rican Government.

214. It would be sufficient simply to refer to these facts at large to establish that Costa Rica has violated its international legal obligation of non-intervention, as alleged in Nicaragua's Application. For the convenience of the Court, however, Nicaragua, in this Chapter organizes the factual material in relation to major elements or aspects of the non-intervention obligation and to specific treaty obligations subsisting between the two countries.

215. The facts[1] establish that Costa Rica has:

(1) breached the duty of non-intervention by providing active assistance to the *contras*;

(2) breached the duty of non-intervention by encouraging, tolerating and acquiescing in *contra* military activities based on and emanating from the territory of Costa Rica, with the full knowledge of the Costa Rican Government;

(3) violated Article I, Second of the Convention on Duties and Rights of States in the Event of Civil Strife, and Article IX of the Convention on Territorial Asylum (made applicable between the parties by the 1956 Agreement) by failing to disarm and intern the *contras* known to be in its territory;

(4) violated Articles VII and VIII of the Convention on Territorial Asylum (made applicable by the 1956 Agreement) by failing to suppress the systematic propaganda and other political activities of Nicaraguan refugees and asylees in Costa Rica inciting to the overthrow of the Government of Nicaragua by force and violence.

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[1] Citations are to the relevant paragraphs in Part One of the Memorial, where references to the original sources are given.

A. Costa Rica Violated the Duty of Non-Intervention by Providing Active Assistance to *Contra* Military Operations

216. The most blatant example of direct Costa Rican assistance to the *contras* is the establishment and operation of the airbase on the Santa Elena peninsula, 20 kilometers south of the border with Nicaragua. This airfield became a key element in the secret network established by the United States administration to supply *contras* operating within Nicaraguan territory during the period when official aid was cut off by congressional action. The information about this operation is fully documented in evidence given to the President's Special Review Board (Tower Commission) and the Joint Congressional Hearings on the Iran-Contra Affair.

217. From this evidence, it appears that United States Ambassador Lewis H. Tambs was a key actor in the affair. His basic mission in Costa Rica, as he saw it, "was to form a Nicaraguan resistance southern front". (See *supra*, para. 21.) The airbase was "an essential or integral part" of any such effort. (See *supra*, para. 107.) It was designed to ensure logistical support of the *contras* not just in the border areas, but inside Nicaragua. "And, by inside Nicaragua, we're talking about, you know, 80 to 100 kilometers, say 50 to 60 miles, . . .". (See *supra*, para. 104.) The construction and operation of the base required the formal approval of the Costa Rican Government. (See *supra*, para. 108.) Ambassador Tambs personally conducted the negotiations leading to the grant of approval. *(Id.)* On the Costa Rican side, President Monge gave his personal authorization. (See *supra*, para. 109.)

218. The record also shows continuous and intimate involvement by Costa Rican personnel in the location, construction and operation of the airbase. (See *supra*, paras. 110-112.) It was a major installation, with a modern runway more than two kilometers in length and facilities for handling large volumes of fuel and cargo. (See *supra*, paras. 112, 116.) The plan was to turn it over to the Costa Rican Government when it was no longer needed to supply the *contras*. (See *supra*, para. 108.) It remained in operation until September 1986 (see *supra*, para. 115), and was an essential link in the supply and support system for *contra* depredations throughout southern Nicaragua. Eugene Hasenfus, the sole surviving crew-member of a *contra* supply plane shot down over Nicaragua, confirmed that he had participated in a number of previous supply flights, including some that used the Santa Elena airbase. (See *supra*, para. 135.)

219. The importance of the facility was fully recognized by the United States National Security Council officials responsible for its establishment and operation. Lt. Col. Oliver North testified at the Iran-Contra hearings that:

> "The airfield at Santa Elena has been a vital element in supporting the resistance. Built by a Project Democracy proprietary (Udall Corporation S.A. — a Panamanian Company), the field was initially used for direct resupply efforts [to the *contras*] [July 1985-February 1986] . . . the field has served as the primary abort base for aircraft damaged by Sandinista anti-aircraft fire." (*Supra*, para. 115.)

Vice Admiral Poindexter, the President's National Security Adviser, testified at the same hearing that the Santa Elena airbase:

> "was a dramatic display of cooperation and support for the President's policy by the country involved". (*Supra*, para. 113.)

220. Costa Rican assistance to *contra* supply activities was not confined to the Santa Elena base. Supply flights proceeding from Ilopango Airport in El

Salvador frequently stopped for refueling at the Juan Santamaria International Airport, San José's main commercial airport. The log books captured from the supply flight shot down over Nicaragua showed that the pilot had made two flights by this route, and testimony before the Iran-Contra hearings described others. (See *supra*, para. 136.) Ambassador Tambs said that such landings required special clearance by airport officials. *(Id.)* Supply flights also used some of the smaller airports (see *supra*, para. 60), and *contra* air strips located on Costa Rican territory (see *supra*, para. 136). (Moreover, whether or not they landed, many if not most of the supply flights traversed Costa Rican air space without hindrance for a large part of the route.)

221. Costa Rica provided direct assistance for supply of the *contras* in Nicaragua by sea as well as by air. In his Iran-Contra testimony, Lt. Col. North described the establishment of a "maritime capability" to transport military supplies from a port in Costa Rica to *contras* operating in Nicaragua. (See *supra*, para. 24.) The arrangements were worked out in a personal meeting between Lt. Col. North and the Costa Rican Minister of Public Security, Benjamín Piza. *(Id.)* Three supply trips were made in the first three months of 1986, and North looked forward to a schedule of "several trips a week". (See *supra*, para. 25.) Reports and communications between Lt. Col. North and the field show that the local port authorities approved of the operation as long as it did not become public. So the voyages were carried out under "a cover operation". "The operational part [was] run strictly without Nicaraguans, except for the boat operators on each trip." *(Id.)*

222. On numerous occasions, Costa Rican officials avowed publicly, some in disapproval and some in support, that the Government was extending direct assistance to the *contras*. In his report on *contra* activities in the border areas, Lt. Col. Mario Araya of the Costa Rican Civil Guard reminded Johnny Campos, Vice Minister for Public Security:

> "We cannot disregard the assistance which the counter-revolutionary and non-counter-revolutionary elements have received from persons who form part of this government . . ." (*Supra*, para. 11.)

223. In May 1985, Col. Ricardo Rivera, a former Chief of the Rural Guard, told reporters at a press conference that officials of the Costa Rican Government maintained close ties with the *contras*, and that the *contras* operated from military camps in Costa Rica with the complicity of ranking government and security officials. (See *supra*, para. 12.) Col. Nestor Mora Rodrígues, a local Rural Guard commander in Los Chiles, the scene of many reported attacks, admitted that he personally put Nicaraguan refugees in Costa Rica in touch with *contra* recruiters. (See *supra*, para. 48.) Col. Gilberto Orozco, head of the Guard for the same province and a notorious *contra* collaborator, said that the Costa Ricans gave the *contras* logistical support, including food and shelter. *(Id.)*

224. Foreign mercenaries who came to Costa Rica to join the *contras* have also testified in court proceedings and to the press about the ubiquity of *contra* ties with the Costa Rican authorities. Peter Glibbery, an Englishman who served with the *contras* in Costa Rica, testified in court that officers and men of the Rural Guard helped with the construction of a *contra* training base in northern Costa Rica. (See *supra*, para. 12.) On his arrival in Costa Rica, he was met by a Rural Guard captain, who drove him to the assigned training base. (See *supra*, para. 91.) Glibbery and his associate, Steven Carr, a US citizen, later made detailed public statements about the involvement of the Costa Rican military with the *contras*. The Civil Guard gave them maps showing target locations

inside Nicaragua and assisted in a *contra* attack on the border post of La Esperanza. A Guard colonel put pick-up trucks at the disposal of the *contras* and showed them access and resupply routes. Carr said that the idea of Costa Rican neutrality was a farce; the mercenaries had "100 per cent support" from Costa Rica. (See *supra*, para. 97.) Claude Chafford, a French mercenary, said that he, like Glibbery, had been escorted to his camp by a Civil Guard officer. The camp was visited almost every day by local Guardsmen who assured the contras that they would be protected. *(Id.)* Two captured Cuban-American mercenaries who served under Fernando Chamorro told how they had been assisted by a Civil Guard colonel in clearing Costa Rican customs with suitcases filled with military supplies. (See *supra*, para. 90.)

225. The six-day attack on San Juan del Norte (see *supra*, para. 68) also owed much to the assistance of Costa Rican officials. Officials in the Rural Guard facilitated the operations to resupply the *contras* while they temporarily occupied the town. (See *supra*, para. 18.) Equally important, Costa Rican authorities, including Rural Guard officials, acquiesced in the transport of foreign journalists to the scene to report on the supposed *contra* "success". *(Id.)*

B. Since 1982, Costa Rica Has Encouraged, Tolerated and Acquiesced in the Preparation and Launching of Hundreds of Armed Attacks from Its Soil against Nicaragua, with Full Knowledge of the Facts and Without Making Serious Efforts to Prevent Such Activities

226. As developed in Chapter III, *supra*, the international law rules against intervention prohibit not only the use of force against another State or active assistance to those seeking its armed overthrow, but also encouragement and even passive toleration or acquiescence by one State when its territory is used as a base or launching pad for attacks against another by irregular forces or armed bands. A State does not discharge its duty under international law by remaining passive towards irregular forces organized and operating in its territory against the Government of a neighboring State, or by adopting an attitude of "neutrality" as between them. States are required to "use all means at their disposal" to prevent and suppress such activities. (See Convention on the Duties and Rights of States in the Event of Civil Strife, *supra*, Article I, First.)

227. The presentation of the evidence in Part One is replete with reports of *contra* training and supply operations in Costa Rica culminating in *contra* attacks on Nicaraguan territory. The Chronological Account, Chapter II, *supra*, lists more than 350 separate armed engagements initiated by the *contras* in less than five years. In the face of *contra* activities on this scale over such an extended period, the failure of the Costa Rican authorities to make any effective response is more than a technical violation of Costa Rica's duty not to "tolerate" such activities on its territory. It can only be described as complicity by encouragement and acquiescence.

228. This conclusion, moreover, is not a mere negative inference from the absence of effective Costa Rican action. Despite its protestations of neutrality, the Costa Rican Government at the highest levels actively encouraged and supported the *contras*. President Monge made a special trip to Washington in April of 1985 to lobby for the approval of military aid to the *contras*. (See *supra*, para. 92.) Foreign Minister Gutierrez said in a press interview that he would look on a change in the Government of Nicaragua with approval. He also publicly called on Congress to pass the bill providing aid to the contras. *(Id.)* The Minister of Public Safety, Benjamín Piza, well known as a *contra* col-

laborator, even met with President Reagan at the White House. (See *supra*, para. 114.)

229. The international responsibility of Costa Rica for the continuous use of its territory by the *contras* over a five-year period for training, supply and safe haven and to launch attacks against Nicaragua, as well as the assistance and collaboration provided by lower level civil and military officers, must be evaluated in the light of these endorsements of *contra* goals and objectives by senior officials.

230. It would serve no purpose to repeat all the incidents already set forth above in Part One. To illustrate the extent of the activities involved and the degree of Costa Rican complicity, this section of the Memorial adopts three approaches:

First, we summarize the evidence showing the number of *contra* military installations present at various times during the relevant period;

Second, we bring together all the evidence concerning some major objectives of *contra* attacks — San Juan del Norte, the subject of a sustained attack in April 1984; Peñas Blancas, an important border post that was attacked more than a dozen times during the four-year period; and Cardenas, also the target of a number of separate attacks;

Third, we assemble the evidence showing that the Costa Rican authorities had prompt and detailed knowledge of the *contra* presence and attacks.

1. Military Strength and Installations

231. For most of the period in issue the *contra* forces operating in Costa Rica numbered in the thousands. The Costa Rican National Security Agency put the figure at 2,000 in June 1982. (See *supra*, para. 38.) Pastora's groups alone claimed 1,000 men at this time. (See *supra*, para. 34.) By late 1986, Ambassador Tambs estimated the force at 1,600-2,800 men. (See *supra*, para. 140.)

232. The principal *contra* military establishments during the period were camps (used for training, supply, safe haven and rehabilitation), and air strips (primarily for supply but sometimes providing air support for *contra* engagements).

233. Paragraph 7, *supra*, lists 27 camps as to which Nicaragua provided detailed information, including precise locations, to Costa Rica. At least 16 camps were operational in 1984 (see *supra*, para. 59), and 27 at the end of 1985. (See *supra*, para. 121.) At least 10 remained active in 1986. (See *supra*, para. 36.) At least nine named air strips were in use by the *contras* in 1984. (See *supra*, para. 60.) Five such landing strips, in use in July 1985, are listed in paragraph 93, *supra*.

2. Attacks on Major Targets

234. The basic pattern of the attacks reported in Part One, *supra*, is roughly similar. *Contras*, often based at different camps, rendezvous in Costa Rican territory near the objective of the attack. The assault forces may range from several tens to several hundred men. The target would be a border post, farm, village or town in Nicaragua. They are invariably pushed back and withdraw to the other side of the border, whence they often continue to attack Nicaraguan positions or forces with longer range weapons. The decisive point is that all of these attacks originated in and returned to Costa Rica. Indeed, often the *contras* confined themselves to firing across the border at Nicaraguan posts near the

frontier without ever leaving Costa Rican territory. The Costa Rican authorities did not attempt to prevent these groups of heavily armed men from assembling, crossing the border or retreating again into Costa Rican territory and returning to their camps.

235. The following examples are illustrative of attacks on a relatively large scale or against particularly important targets or both.

236. *The offensive against San Juan del Norte* — The most massive attack launched by the *contras* operating out of Costa Rica was against San Juan del Norte, a port on the Atlantic coast about 2 kilometers from the border. There had been smaller attacks against the town in June and July of 1983 (*supra*, para. 50), but the major assault came in April 1984, at the very moment when Nicaragua initiated proceedings against the United States in this Court.

237. The attack began with a mortar barrage from Costa Rican territory on 6 April, followed by further mortar bombardment from the sea on 9 April. On the 12th, a force of more than 500 *contras* attacked the town, with sea and air support. The attackers ultimately overwhelmed the 71 defending militiamen. Twenty-one were killed; the rest, wounded and captured, were taken to Costa Rican territory. On 17 April, after five days in *contra* hands, the town was recaptured by Nicaraguan forces, who drove the *contras* back across the border. A few days later, the wounded and kidnapped Nicaraguans who had been taken in the assault were returned to Nicaragua through its embassy in San José. (See *supra,* paras. 18, 68.)

238. During the entire 11 days of the engagement, the *contras* were supplied by boat from Costa Rica. As noted above, Costa Rican officials acquiesced in these supply operations and made it possible for foreign journalists to travel to San Juan del Norte to report on the supposed "victory". (See *supra*, para. 18.)

239. The town was attacked by a band of *contras* from Costa Rica again on 18 March 1985 (see *supra*, para. 88), and there was a further episode on 29 May 1986. (See *supra*, para. 134.)

240. *Attacks against Peñas Blancas* — This border crossing point on the Pan-American highway has been perhaps the most frequent target of *contra* attack. The first reported engagement is as early as April 1982. The *contras* fired on the customs post from their positions in a Costa Rican government building, without crossing into Nicaraguan territory. *Contra* leaders Fernando and Edmundo Chamorro claimed responsibility for the attack. (See *supra*, para. 134.)

241. On 31 July 1983, the *contras* again opened fire from the Costa Rican side of the border, and shots were exchanged for some time. (See *supra*, para. 51.)

242. On 28 September, the post was one of the main targets of a large scale ARDE offensive, which also included Cardenas and Sapoa. After a first assault was repulsed, the attackers withdrew behind the Costa Rican border and bombarded the post with mortars and heavy weapons. A second assault was supported by mortar fire from emplacements inside the Costa Rican customs facilities. The Nicaraguan customs post was destroyed. Three Nicaraguan soldiers were killed and nine wounded. That evening, Nicaraguan positions in the El Naranjo sector came under air bombardment. (See *supra*, para. 56.)

243. The local Costa Rican authorities knew in advance when and where the attack would take place. (See *supra*, para. 57.) Instead of opposing it, Costa Rican civil and military personnel withdrew from their positions before the attack began. The buildings they abandoned were used by the *contras* in their attack. *(Id.)*

244. Subsequent attacks on Peñas Blancas occurred:

- — 18 October 1983; four workers from the La Flor farm were kidnapped. (See *supra*, para. 58.)
- — 13 March 1984; one Nicaraguan wounded; the *contra* positions were 200 meters within Costa Rican territory; some of the shots were fired from the Costa Rican command post. (See *supra*, para. 67.)
- — 17 March 1984. *(Id.)*
- — 20 October 1984. (See *supra*, para. 80.)
- — 18 February 1985; 60 *contras* supported by mortars, machine guns and grenade launchers. (See *supra*, para. 88.)
- — 4 September 1985. (See *supra*, para. 120.)

245. *Attacks against Cardenas* — The repeated attacks against the Nicaraguan town of Cardenas are prime examples of the pattern described above. On the evening of 1 December 1982, a band of *contras* attacked the town supported by at least one aircraft. After a five-hour fire fight they withdrew. (See *supra*, para. 42.) Although the events took place in view of several Costa Rican observation posts the Costa Rican authorities did nothing to stop the attack. *(Id.)* However, Arnoldo Ferreto, a member of the Costa Rican Chamber of Deputies stated:

> "We have been able to confirm that the light airplane which overflew the village of Cardenas during the attack perpetrated against it took off from Playa Blanca in the jurisdiction of the Hacienda El Murciélago, on Costa Rican territory.
>
> The Government knows that there and in a nearby estate there is not one small airplane, but two, plus a camouflaged helicopter.
>
> The group of counter-revolutionaries who attacked the town [Cardenas] crossed the border having departed from Chapernon and Peña Lonja, in Costa Rican territory a few kilometers from the border." *(Id.)*

246. Another large-scale assault against Cardenas took place on 28 September 1983 (in which Peñas Blancas and Sapoa were also targets) (see *supra*, para. 56), and again on 18 November. (See *supra*, para. 58.) In 1984, attacks occurred on 30 March (see *supra*, para. 67), and on 29 April, with 81 mm. mortar fire. (See *supra*, para. 69.)

247. On 28 January 1985, the *contras* attacked a farm two kilometers from Cardenas kidnapping three Nicaraguans and taking them to Costa Rica. (See *supra*, para. 84.)

248. *Other attacks* — On 8 September 1983, two ARDE planes entered Nicaragua from Costa Rican airspace. One of them was shot down in an attack on Managua's principal commercial airport, the Augusto C. Sandino International Airport. The other was driven off in the direction of Costa Rica. (See *supra*, para. 55.)

249. On 2 October 1983, *contras* based in Costa Rica made a speedboat attack that destroyed two fuel tanks at Benjamín Zeledón on the Atlantic Coast of Nicaragua. Almost 400,000 gallons of diesel fuel and gasoline were destroyed, paralyzing economic activity in the entire Department of Zelaya for a considerable period. (See *supra*, para. 58.)

250. On 7 August 1985, a group of *contras* from Costa Rica ambushed a boat travelling on the San Juan River and removed its 47 passengers to Costa Rica. Among them were 29 United States citizens who were members of the organization "Witnesses for Peace". There were also a number of American journalists. John Dasco, an NBC television correspondent, confirmed that the terrorists belonged to ARDE. When the passengers were freed by their kidnappers the

next day, they were arrested by the Costa Rican Civil Guard. (See *supra*, para. 119.) The record shows a number of other *contra* attacks from Costa Rica against Nicaraguan traffic on the San Juan River. (See *supra*, paras. 47, 50; also see Ann. C, Attachment 1.)

3. *Costa Rica's Knowledge and Complicity*

251. From 1982 on, the *contras* carried on a major military campaign against Nicaragua based on and launched from Costa Rican territory. Several thousand men, armed with heavy weapons and with air and sea support, conducted hundreds of attacks on Nicaragua in that period. An extensive air and seaborne supply operation used Costa Rican air strips, air space and ports to provide arms and other military supplies to the *contras* for *contra* operations deep in Nicaragua. At the same time, political organizations supporting this military effort operated freely in the Costa Rican capital. (See *supra*, paras. 17, 39, 40, 43, 45, 62, 99, 101, 102, 103, 124, 126, 127, 128, 133.) All this was reported fully in the regular Costa Rican press and in propaganda disseminated by the *contras* and their supporters.

252. What is involved here is not simply a few sporadic border raids by outlaws that might not be noticed by the authorities. Activities on the scale shown by the evidence could not escape the observation of any Government in control of its own territory, even without the assistance of outside sources of information. The Costa Rican authorities must have been aware of this pattern of conduct, just as any Government is aware of massive activities carried out openly and notoriously within its territory and directly affecting its national interest and international relations.

253. In this case, however, the Court need not rely on inferences about what "must have been known". Costa Rica was informed explicitly and in detail about the *contra* activities from many sources, inside and outside the country. In fact, the evidence shows a number of admissions by responsible Costa Rican officials that the Government was well aware of the *contra* operations. As early as January 1982, the Costa Rican Minister of Public Security and Administration, Arnulfo Carmona Benavides, confirmed "the existence of Nicaraguan anti-Sandinista camps at the Northern border". (*Supra*, para. 33.) The Costa Rican National Security Agency estimated that there were 2,000 *contras* operating in the country in June 1982. (See *supra*, para. 38.) In August of 1983, Lt. Col. Mario Araya, head of the Special Intervention Unit of the Ministry of Public Security, warned the Vice Minister that "the subversives [i.e., *contras*] travel freely through the entire zone, without encountering any opposition from the respective authorities". (See *supra*, para. 11.) When the Minister of Public Security and Minister of Governance travelled to the northern region, they received a large number of protests about the complicity of Costa Rican officials in *contra* military activities in the area. (Ann. H, Attachment 65.)

254. Nicaragua itself continuously placed Costa Rica on notice of what was going on. The Nicaraguan Foreign Ministry dispatched more than 150 diplomatic notes protesting specific *contra* actions and often providing elaborately detailed information about them. (See Ann. A.) The meetings of the Mixed Commission and the Commission on Supervision and Prevention were also used as a forum for the transmission of information from Nicaragua to Costa Rica about *contra* actions. (Ann. B, Attachments 1 and 2. See also Ann. B, Attachment 3.)

255. In addition, the Costa Rican authorities were informed and alerted by many outside sources. Members of the Costa Rican legislature protested against

the passive attitude of the government and provided detailed information in an effort to spur action against the *contras*. As we saw above, Deputy Arnoldo Ferreto, in December 1982, pinpointed the origins of the attack against Cardenas in Costa Rican territory. He warned that:

> "New acts of aggression are being prepared in encampments situated on several estates on the border, one of which belongs to Héctor García; another, in Monte Plata, is the property of a widow named Medina; and also on the estates of Roberto Gallegos and Ramiro Osegueda." (See *supra*, para. 42.)

256. In the summer of 1984, Deputy Ricardo Rodríguez Solórzano protested against the presence of *contra* forces on Costa Rican territory. (See *supra*, para. 72.) In a statement at a press conference he gave details of the establishment and equipment of anti-Sandinista groups on Costa Rican territory. *(Id.)* In August 1985, the parliamentary head of the Social Christian Unity Party, Deputy Danilo Chaverri Soto, said he personally had confirmed that the *contras* were using Costa Rican territory for their operations and had reported the facts to the Minister of Public Security. (See *supra*, para. 117.)

257. The *contra* activities were even the subject of judicial proceedings in the Costa Rican courts. A murder trial of members of ARDE in December 1984 produced extensive testimony about ARDE operations in the border zone. (See *supra*, para. 73.)

258. *Contra* activities were widely reported both in the regular Costa Rican press and in the special *contra* publications that were circulated with the permission of the Government. (See *infra*, paras. 277-280. Also see *supra*, paras. 102, 103.)

259. Finally, as appears from the Tower Commission Report and the Iran-Contra hearings, Costa Rica's relations with the United States for much of this period were dominated by discussions of the *contra* "southern front" in Costa Rica and how to improve it and make it more effective. Salient examples are the negotiations with Ambassador Tambs about the Santa Elena airbase (see *supra*, paras. 108, 109), the discussions between Lt. Col. North and the Costa Rican Minister of Public Security, Benjamín Piza, concerning the maritime supply operation (see *supra*, para. 24), and another meeting of Minister Piza in the White House with President Reagan, North and the CIA station chief for San José. (See *supra*, para. 114.)

260. International law does not permit a State to remain passive in the face of such evidence. Every one of the legal sources and authorities analyzed and discussed in Chapter III, *supra*, prohibits a State from "tolerating" or "acquiescing in" activities of the sort shown by this evidence. The State on whose territory such activities take place is under a positive duty to take affirmative action to eliminate the threats to its neighbor. As noted (*supra*, paras. 171-173), this affirmative obligation is spelled out expressly in the Convention on the Duties and Rights of States in the Event of Civil Strife. The parties agree:

> "To use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife." (Article I, First.)

261. This Convention, to which both States before the Court are parties, is made specifically applicable to them bilaterally in the 1956 Agreement under which:

> "each Party undertakes to take the necessary measures to prevent revolutionary movements against the other Party from being initiated or carried out in its territory". (See *supra*, para. 204.)

The facts show that Costa Rica has failed egregiously to discharge its affirmative duties in this respect.

C. Costa Rica Failed Repeatedly to Carry Out Its Duty to Intern and Disarm *Contras* Within Its Territory

262. Certain aspects of the affirmative duty implicit in the general norm against intervention are elaborated and given more specific content in conventions and treaties to which Costa Rica and Nicaragua are parties. Under the Convention on Duties and Rights of States in the Event of Civil Strife, the parties agree "To disarm and intern every rebel force crossing their boundaries . . .". (Art. I, Second.) Article IX of the Convention on Territorial Asylum, incorporated textually in the 1956 Agreement, between the two countries, provides:

> "At the request of the interested state, the state that has granted refuge or asylum shall take steps to keep watch over, or to intern at a reasonable distance from its border, those political refugees or asylees who are notorious leaders of a subversive movement, as well as those against whom there is evidence that they are disposed to join it."

263. The whole five-year history of inaction by the Costa Rican Government testifies to its neglect of these specific duties. But Nicaragua's case goes further. On a number of occasions Costa Rican authorities actually arrested notorious *contra* leaders, sometimes along with their arms and equipment. Not even these prisoners were interned or permanently disarmed. In every such case, in deliberate violation of the treaty obligation, Costa Rica released them after a short time and returned their weapons.

264. Edén Pastora, the openly acknowledged and notorious military leader of the ARDE forces was several times taken into custody. On 22 May 1982, he was expelled from the country, but was readmitted less than four months later. (See *supra*, para. 35.) A month after his return he was captured with a large quantity of arms. Upon the personal intervention of President Monge, he was promptly released and the weapons were returned. *(Id.)* In November, *contra* leader Fernando Chamorro was detained with a cargo of weapons, maps, parachutes and other equipment. He was released on the same day. Two days later the Ministry of Public Security ordered the weapons returned. (See *supra*, para. 41. See also *supra*, para. 60 (concerning the pattern of repeated entries and expulsions of Chamorro).)

265. Pastora was expelled from Costa Rica again in April 1983, but in January 1984 he crossed the border at the head of a 192-man force, seeking refuge. The regional commander of the Rural Guard, Col. Gilberto Orozco, permitted Pastora and his men to enter and met with him on Costa Rican soil. (See *supra*, para. 65.) Although Col. Orozco acted directly contrary to stated Costa Rican policy at the time, he was not effectively disciplined, nor was Pastora expelled. (*Id.*; see also *supra*, para. 66.)

266. When Pastora's helicopter crashed inside Costa Rica in July 1985, he was treated at a local hospital and then permitted to fly to Panama, whence he

ultimately returned to resume his Costa Rica-based attacks on Nicaragua. (See *supra*, para. 96.) When he finally announced that he was abandoning the contest in defeat, Costa Rica granted him asylum. (See *supra*, para. 125.)

267. A final example is the capture, in February 1983, of a mobile transmitter used by the *contras* for clandestine radio broadcasting. The transmitter was discovered and seized by a Rural Guard unit under the command of Major Mario Jara Castro. Vice Minister of Governance, Enrique Chacón, gave him personal instructions to return the transmitter to its *contra* operators. (See *supra*, para. 46.)

268. Nicaragua repeatedly protested the activities of Pastora and the other *contra* leaders in Costa Rica, in accordance with the requirements of Article IX of the Convention on Territorial Asylum. (See *supra*, para. 207.) To no avail.

269. Thus Costa Rica not only failed to intern and disarm the *contras*, as was its duty under the general norm of non-intervention and the specific provisions of the Convention on Duties and Rights of States in the Event of Civil Strife and the 1956 Agreement. When *contra* leaders or units or equipment actually fell into the hands of Costa Rican authorities, they were released and permitted to return to the attack against Nicaragua.

D. Costa Rica Permitted the Establishment in San José of Organizations for the Purpose of Providing Political Support for the Military Activities of the *Contras* and for Publicly Advocating the Overthrow of the Government of Nicaragua by Force and Violence

270. Freedom of expression and association are basic human rights. They are not surrendered when a person takes political refuge or asylum in another country. These rights are recognized in Articles VII and VIII of the Convention on Territorial Asylum, made applicable as between Nicaragua and Costa Rica by the 1956 Agreement. But under the Convention, asylees and refugees cannot abuse these rights of expression and association to incite to the use of force and violence to overthrow the Government of their native country:

> "Article VII. Freedom of expression of thought, recognized by domestic law for all inhabitants, may not be ground of complaint by a third state on the basis of opinions expressed publicly against it or its government by asylees or refugees, *except when these concepts constitute systematic propaganda through which they incite to the use of force or violence against the government of the complaining state.*
>
> Article VIII. No state has the right to request that another state restrict for the political asylees or refugees the freedom of assembly or association which the latter state's internal legislation grants to all aliens within its territory, *unless such assembly or association has as its purpose fomenting the use of force or violence against the government of the soliciting state.*" (Emphasis added.)

271. Costa Rica has certainly permitted the *contras* to exercise the rights of expression and association. Unfortunately, it has not ensured that such exercise is kept within the limits established by the Convention. Since 1982 San José has been the headquarters of the major *contra* political organizations, providing essential political support for the military operations in the field and maintaining a drumbeat of systematic propaganda through a variety of media inciting to the overthrow of the Nicaraguan Government by force and violence.

1. Major Contra *Political Organizations in San José*

272. In the period since 1982, two major *contra* organizations and a number of their subsidiaries operated from headquarters in San José. The first was ARDE, established in September 1982 and operating continuously until mid-1986. The second is UNO, organized in mid-1985 at the instance of the United States, and still the chief umbrella organization for all groups working for the violent overthrow of the Nicaraguan Government. Although in this Memorial these organizations are referred to as "political", they were not in any sense participants in the Nicaraguan domestic political process. Nicaragua conducted an election for President and Constituent Assembly in November 1984, preceded by several months of campaigning. (See *Nicaragua* v. *United States, supra,* p. 90.) ARDE and its subsidiary organizations took no part in this process. Instead, they actively boycotted the elections and sought to discredit them.

273. The function of the *contra* organizations headquartered in San José is to provide political support for the military operations being conducted by the *contras* not only on the Costa Rican border but elsewhere. Some of the activities are public: conferences, meetings, rallies, manifestos, press relations and the like. The leit-motif of all these events and publications is the need for armed action to oust the present Government of Nicaragua. In addition, the organizational headquarters have provided a convenient place for *contra* leaders to meet to develop military strategy and plans and to co-ordinate supply and logistical services for the armed *contra* bands. Abundant detailed evidence supports these conclusions.

274. ARDE was essentially a union of a number of smaller organizations active in San José in 1981 and 1982. One of these was headed by Edén Pastora. In his initial press conference in San José in April 1982, Pastora defined the goal of his organization as the armed overthrow of the Nicaraguan Government. (See *supra*, paras. 16, 34.) Within a few months Pastora formed an alliance with Alfonso Robelo's MDN, which marked the occasion by placing paid advertisements in the San José press announcing that "The moment has arrived for open struggle . . ." (See *supra*, para. 39.) In July, José Francisco Cardenal, the leader of another group known as UDN/FARN, declared at a San José press conference that a new Government in Nicaragua would have to be established by military means. (See *supra*, para. 38.)

275. These three groups, all of which had already declared themselves in favor of armed overthrow of the Nicaraguan Government (together with an organization of Miskito Indians known as Misurasata), joined to form ARDE in September of 1982. (See *supra*, para. 40.) At the press conference announcing the merger, the leaders avowed that the object of the new organization was the overthrow of the Government of Nicaragua. (See *supra*, para. 16.)

276. At the beginning of the new year, the ARDE leaders repeated their public call for armed struggle against Nicaragua. (See *supra*, para. 45.) Again at the turn of 1984, in a manifesto published as a paid advertisement in San José, ARDE proclaimed itself an organization that:

> "supports a political and military struggle to eradicate the Marxist-Leninist totalitarianism of the FSLN, to expel the interventionist forces and to rescue the Nicaraguan revolution". (See *supra*, para. 62.)

After the middle of 1985, ARDE began to go into eclipse as Pastora's military fortunes and relations with the United States Government worsened. (See *supra*, para. 125.) A new organization, UNO (the United Nicaraguan Opposition), was formed under the auspices of the United States in an effort to unify and rehabilitate the political arm of the *contras*. Alfonso Robelo of ARDE was one of the original founders. (See *supra*, para. 99.) Shortly thereafter, BOS (Opposition Bloc of the South) was formed in San José, concentrating on political support for the southern front. According to its constitution, published widely in Costa Rica, one of its purposes was to "legitimize" the armed struggle against the Government in Managua. *(Id.)* At a public rally in San José at about the same time, the UNO leaders again issued an appeal for unity in the fight to oust the Nicaraguan Government. (See *supra*, para. 101.)

2. Costa Rican Media

277. In early 1985, two avowedly *contra* papers made their appearance on the San José scene. They were called *Nicaragua Hoy* and *Liberación* and were issued bi-weekly, as supplements to regular Costa Rican daily papers. Leading members of UNO and ARDE were on the editorial board of each paper. (See *supra*, para. 102.)

278. These two papers are nothing less than vehicles for "systematic propaganda" inciting "to the use of force and violence against the government" of Nicaragua. The material takes many forms, including editorials, explicit calls for support for *contra* military groups, interviews with *contra* military commanders, and sensationalized and distorted accounts of *contra* "victories" and events in Nicaragua. (See *supra*, para. 103.)

279. In addition, the *contras* placed paid advertisements in the regular newspapers in San José advocating the use of violence to overthrow the Nicaraguan Government. References to a sampling of these advertisements follow:

— MDN in *La Nación* of 20 June 1982 and in *La República* the following day. (Ann. E, Attachment 2, Nos. 1, 2.)
— FDN in *La Nación* on 6 October 1982. (Ann. E, Attachment 2, No. 6.)
— the Nicaraguan Conservative Party in exile, in *La Nación* on 4 December 1982. (Ann. E, Attachment 2, No. 8.)
— ARDE in *La Prensa Libre* on 9 January 1984. (Ann. E, Attachment 2, No. 16.)
— BOS in *La Nación* on 2 August 1985. (Ann. E, Attachment 2, No. 18.)

280. *Contra* propaganda is not confined to the press. Radio Impacto, a station based in Costa Rica, regularly broadcasts news of *contra* activities together with messages inciting to the overthrow of the Nicaraguan Government by force of arms. (See *supra*, para. 130.) And on at least one occasion, Pastora was able to bootleg a message from a covert transmitter in Costa Rica on to a Nicaraguan television channel, again calling for armed struggle against the Government. (See *supra*, para. 45.)

3. Since 1985

281. As described in Chapter I, *supra*, paragraphs 19-26, basic United States strategy in recent years calls for the Costa Rican groups to carry the main political burden for the *contras*. As the CIA station chief put it, Costa Rica:

> "presented a better environment for the political declarations to be made, access to [San José] where there was relative tranquility, modern conveniences, daily flights to the U.S. and so forth, and that is what the political side needed". (*Supra*, para. 19.)

282. In order to accommodate Costa Rican sensibilities and ensure its continued permission to operate on "the political side", the *contras* even moderated the level of military activity emanating from Costa Rica from 1986 on. (But see *supra*, paras. 134, 135.) Political action in support of the military effort, however, remained undiminished.

283. The leaders of UNO and BOS maintained their residences in San José with full and continuous access to the local media. They mobilized support for United States military aid for the *contras*. (See *supra*, para. 123.) In June, for example, Robelo said in an interview that the *contras* would "win their war" if they got enough United States support. (See *supra*, para. 126.)

284. The amalgamation of UNO and ARDE was announced in San José along with the appointment of Fernando Chamorro as commander of the unified military forces in the south. (See *supra*, para. 124.) UNO and BOS also combined in San José in June. (See *supra*, para. 127.) At the first BOS "congress", held in San José in August 1986, leaders asserted that the *contra* goal was "to take a piece of [Nicaraguan] territory and hold it" and "to develop a front in Nicaragua's urban areas". (See *supra*, para. 128.)

285. UNO too held its major conferences in San José. The purpose of one such "assembly", held in November, was to plan a military offensive against Nicaragua, to culminate in the installation of a "provisional government". (See *supra*, para. 130.)

286. The publication of *Nicaragua Hoy* and *Liberación* and the broadcasts from Radio Impacto continued throughout this period along the same lines as earlier described. (See, e.g., *supra*, paras. 130, 133.) Nicaragua protested these activities frequently and in detail. (See *supra*, para. 130.) If Costa Rica's obligation to take action under Articles VII and VIII of the Convention on Territorial Asylum is contingent on a request from the aggrieved party, Nicaragua has amply fulfilled the requirement.

287. The foregoing account is only illustrative of the multi-faceted political and propaganda barrage conducted by the *contra* "political" organizations based in San José. They had one end in view: the promotion and incitement of violence and armed force against the Government of Nicaragua. Costa Rica's failure to take any steps to stop this activity was, in effect, a grant of permission and approval. As such, it violated the general norm of non-intervention and the specific obligations of Articles VII and VIII of the Convention on Territorial Asylum, as incorporated into the 1956 Agreement between Nicaragua and Costa Rica.

E. Conclusion

288. This Chapter has marshaled detailed evidence showing some of the ways in which Costa Rica has violated its duty not to intervene in the affairs of Nicaragua. But concentration on the specific details — a particular raid or attack or supply operation or publication or press conference or broadcast — runs the risk of not seeing the forest for the trees.

289. Nicaragua's case does not depend on any particular incursion or overt act. It is based on the entire pattern of activity, military and political, conducted openly and notoriously by the *contras* in Costa Rica over the five-year period.

290. The evidence establishes that, from 1982 to the present, large numbers of armed *contras* — as many as several thousand in most periods — operating from numerous bases in Costa Rica, conducted repeated raids and attacks into Nicaragua. Costa Rican territory and air-space was an essential element in the

efforts mounted by the United States to provide arms, munitions and supplies to *contra* bands operating well within Nicaragua. The overall political leadership of the *contras* was headquartered in San José. Its function was to generate material and financial support for the military effort and to orchestrate propaganda inciting to the overthrow of the Nicaraguan Government by force of arms.

291. The evidence establishing this pattern is voluminous. It includes accounts of eye-witnesses, admissions by Costa Rican officials and military officers, public statements of the *contra* leaders themselves, contemporaneous records maintained by the Nicaraguan security forces, more than 150 diplomatic notes and other formal communications from the Foreign Ministry of Nicaragua, documents exchanged between the members of the Mixed Commission and the Commission of Supervision and Prevention, testimony before the Joint Congressional Hearings Before the Iran-Contra Affair and in Court proceedings, the Report of the Tower Commission and large numbers of corroborating press accounts.

292. The general pattern of *contra* activity in the border region and in the capital over the past five years is unmistakable and undeniable. Indeed, Costa Rica has made little effort to deny it. Given the volume of diplomatic correspondence, press coverage and other channels of information, it is clear that Costa Rica was fully aware of the situation, and in great detail. Given the extent and duration of this activity, the conclusion is inescapable that it was carried out with the permission and approval of the Government of Costa Rica — at the very minimum, with its knowledge, acquiescence and toleration. Costa Rica is therefore responsible to Nicaragua under the governing international law both on the basis of its positive actions and its omissions.

293. Nicaragua submits that the pattern of Costa Rican conduct established by the evidence, including:

— its active assistance, encouragement and approval of the military and political efforts of the *contras* in that country,
— its continued acquiescence in and tolerance of such activities, and
— its failure to take steps to suppress the armed attacks and hostile propaganda proceeding from its territory against the Government of Nicaragua,

constitutes intervention in the affairs of Nicaragua in violation of the international norms prohibiting such intervention and of the conventional obligations subsisting between the two States.

PART THREE

USE OF FORCE

CHAPTER V. BREACHES OF THE OBLIGATION NOT TO USE FORCE AGAINST ANOTHER STATE

A. Introduction

294. The purpose of this part of the Memorial is to develop the issues presented in paragraphs 15 and 20 of Nicaragua's Application, namely:

> "15. The facts on which Nicaragua relies disclose serious and persistent violations of the provisions of the United Nations Charter, Article 2, paragraph 4, according to which all Members of the United Nations shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. In particular the assistance provided by Costa Rica to the counterrevolutionary armed bands in their attacks on the territory of Nicaragua and its civilian population (as described above) constitute the use of force against the territory of Nicaragua."
>
> "20. The policy of assistance to the *contras* adopted by Costa Rica involves breaches of the obligation of customary international law not to use force against another State; and so also the direct attacks against Nicaragua by the armed forces of Costa Rica constitute serious breaches of this same obligation."

B. Assistance to *Contras* Operating Against Nicaragua

295. The evidence presented by Nicaragua establishes the existence of a long-established pattern of activities by *contras* operating from the territory of Costa Rica with the assistance of officials of the Government both at the local and at the ministerial level. The legal responsibility of the respondent State for the harmful consequences of the operations of the *contras* based in Costa Rica has three independent bases, as follows:

(a) direct responsibility for breaches of the obligation not to use force;
(b) responsibility by way of assistance to the *contras* and complicity in their activities; and
(c) responsibility consequent upon breaches of the duty to exercise due diligence in the control of activities within the national territory.

296. The material relating to these three cumulative bases of responsibility will now be examined. A brief exposition of the pertinent legal principles will be followed by the application of the law to the facts of the case.

1. *Breaches of the Obligation Not to Use Force*

(a) *The law*

297. The general norm of customary law was affirmed by the Court in its Judgment in *Nicaragua* v. *United States* in the following passages:

> "188. The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations'. The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.
>
> . . .
>
> 190. A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*' (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, *ILC Yearbook*, 1966-II, p. 247). Nicaragua in its Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations 'has come to be recognized as *jus cogens*'. The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this

> principle is a 'universal norm', a 'universal international law', a 'universally recognized principle of international law', and a 'principle of *jus cogens*'." (*I.C.J. Reports 1986*, pp. 99-101.)

298. These passages relate to the position of Nicaragua and the United States but there is no ground for thinking that the position as between Nicaragua and Costa Rica is essentially different; and thus it is not necessary to elaborate further upon the legal basis of the norm prohibiting the use of force. However, the significance attached to the principle by the Governments of Costa Rica and Nicaragua is demonstrated in resolutions of a declaratory nature adopted at intergovernmental conferences. Thus the Eighth International Conference of American States at Lima in 1938 adopted a Declaration of American Principles, of which the third principle provided that:

> "The use of force as an instrument of national or international policy is proscribed." (Declaration CX, *International Conferences of American States*, 1st Supp. 1933-1940, p. 309 (Washington, 1940).)

299. In the same connection the following provisions of the Charter of the Organization of American States (amended by the Protocol of Buenos Aires in 1967) are declaratory in character and appear in a Chapter headed "Fundamental rights and duties of States":

> "*Article 18*
>
> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.
>
> *Article 19*
>
> No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind."

In fact, both Costa Rica and Nicaragua are parties to this instrument.

300. In its Judgment in *Nicaragua* v. *United States*, the Court adverted to certain aspects of the principle relating to the non-use of force which are of particular relevance to the facts on which Nicaragua presently relies. The relevant passages are as follows:

> "191. As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), referred to above). As already observed, the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question. Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force. In particular, according to this resolution:

> 'Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.
>
> . . . .
>
> States have a duty to refrain from acts of reprisal involving the use of force.
>
> . . . .
>
> Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of that right to self-determination and freedom and independence.
>
> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
>
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.'

192. Moreover, in the part of this same resolution devoted to the principle of non-intervention in matters within the national jurisdiction of States, a very similar rule is found:

> 'Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.'

In the context of the inter-American system, this approach can be traced back at least to 1928 (Convention on the Rights and Duties of States in the Event of Civil Strife, Art. 1 (1)); it was confirmed by resolution 78 adopted by the General Assembly of the Organization of American States on 21 April 1972. The operative part of this resolution reads as follows:

> *'The General Assembly Resolves:*
>
> 1. To reiterate solemnly the need for the member states of the Organization to observe strictly the principles of non-intervention and self-determination of peoples as a means of ensuring peaceful coexistence among them and to refrain from committing any direct or indirect act that might constitute a violation of those principles.
>
> 2. To reaffirm the obligation of those states to refrain from applying economic, political, or any other type of measures to coerce another state and obtain from it advantages of any kind.
>
> 3. Similarly, to reaffirm the obligation of these states to refrain from organizing, supporting, promoting, financing, instigating, or tolerating subversive, terrorist, or armed activities against another state and from intervening in a civil war in another state or in its internal struggles'." (*I.C.J. Reports 1986*, pp. 101-102.)

301. In the submission of the Government of Nicaragua the toleration of or acquiescence in the organization of *contras* for their hostile operations against a neighboring State involves a simple or direct responsibility for breach of the

principle of the prohibition of the use of force. As the Court points out in the passages just quoted, such activities constitute a "use of force" and it is submitted that this is so both in terms of customary international law and in terms of Article 2, paragraph 4, of the United Nations Charter.

302. The principle involved here is not concerned with a negligent inability to exercise "due diligence" in the control of activities on the territory of the State. The standard to be applied relates to a positive attitude of toleration of and acquiescence in the activities amounting to an adoption and approbation of the operations concerned. As the Declaration on Principles of International Law concerning Friendly Relations expresses the matter:

> "Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
>
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force." (UN General Assembly resolution 2625 (XX) (24 October 1970).)

(b) *The facts*

303. Nicaragua submits that the evidence establishes that the Government of Costa Rica has tolerated and acquiesced in the hostile activities of *contras* (usually ARDE) against Nicaragua, such operations being mounted and sustained from bases and other facilities on the territory of Costa Rica.

304. The evidence supporting this submission will be presented according to an informal and convenient classification. The general narrative of the covert war, as conducted through the agency of groups on Costa Rican territory with the complicity of the Government of Costa Rica, has been set forth in Part One of the Memorial.

(i) *Public statements, press conferences and press advertisements concerning* contra *activities and goals*

305. It was common in the years 1982 to 1986 inclusive for the *contra* organizations based in Costa Rica to publicize their policies and plans to mount armed actions against Nicaragua. In 1982 the Government of Nicaragua twice protested to Costa Rica about public statements by *contra* leaders. A Note dated 16 April 1982 complained of statements by Edén Pastora in which he gave clear indications of his plans and expectations involving the use of Costa Rican territory for the organization of *contras* to be used for hostile operations against Nicaragua. (Ann. A, Attachment 1.) Similarly, in a Note dated 4 August 1982 the Government of Nicaragua protested as a result of a press conference given by José Francisco Cardenal in which he claimed responsibility for criminal acts by *contras* based in Honduras involving the killing of fourteen civilians in the Nicaraguan town of San Francisco del Norte. (Ann. A, Attachment 16.)

306. The constant use of Costa Rican territory for incitement to the use of violence against Nicaragua was the subject of a further Note dated 8 January 1983 in which the Government of Nicaragua described the developing pattern of activity in Costa Rica by ARDE. (Ann. A, Attachment 22.) A further Note dated 6 October 1983 complained of the public campaigns inciting violence against the Nicaraguan Government which were being conducted by Pastora and Robelo. (Ann. A, Attachment 75.)

307. On 23 September 1983 an airplane coming from Costa Rican territory attacked the "Nicarao" electric plant and the "Induquinisa" factory and returned to Costa Rica. Responsibility for this operation was claimed by the *contra* leader Edén Pastora in a communiqué issued by ARDE military headquarters in San José. In a Note dated 23 September 1983, Nicaragua protested both the attack and the repeated use of Costa Rican territory for *contra* propaganda and military activities. (Ann. A, Attachment 63. Also see Ann. H, Attachments 32, 34.)

(ii) *A continuing pattern of armed attacks across the border*

308. In the period 1982 to 1986 inclusive, there has been a continuing pattern of armed attacks against Nicaraguan targets from within Costa Rica, after which the *contras* responsible withdrew to positions or bases within Costa Rica. This pattern forms evidence of a concerted campaign and a sustained phenomenon well known to the Costa Rican Government.

309. The persistence and scale of the activity is evident from the succession of Notes from the Government of Nicaragua protesting about specific armed attacks. The pertinent Notes of protest include the following:

2 December 1982	(armed attack on town of Cardenas) (Ann. A, Attachment 18).
12 April 1983	(hijacking of boat and kidnappings at Tasbapanni) (Ann. A, Attachment 26).
16 April 1983	(attack on border post of Fatima de Sarapiqui) (Ann. A, Attachment 28).
3 May 1983	(attacks on border posts of La Esperanza and Fátima) (Ann. A, Attachment 38).
10 May 1983	(boat hijacking, kidnappings, and attack on border post of Pueblo Nuevo) (Ann. A, Attachment 44).
12 May 1983	(attack on border post of El Papaturro) (Ann. A, Attachment 47).
25 May 1983	(ambush on Río San Juan) (Ann. A, Attachment 48).
3 July 1983	(armed attacks on San Juan del Norte) (Ann. A, Attachment 53).
8 September 1983	(air attack on Sandino Airport) (Ann. A, Attachment 58).
23 September 1983	(air attacks on power plant and a factory) (Ann. A, Attachment 63).
27 September 1983	(attack in sectors of El Naranjo and Las Florcitas) (Ann. A, Attachment 65).
28 September 1983	(attack on customs post at Peñas Blancas) (Ann. A, Attachment 67).
28 September 1983	(attacks on towns of Cardenas and Sapoa and customs post of Peñas Blancas) (Ann. A, Attachment 68).
4 October 1983	(attack on the port of Benjamín Zeledón) (Ann. A, Attachment 74).
7 October 1983	(attack on border post of El Naranjo) (Ann. A, Attachment 76).
6 November 1983	(attack on border post of Pueblo Nuevo) (Ann. A, Attachment 82).
8 November 1983	(attack on Orosi) (Ann. A, Attachment 84).
18 November 1983	(attack on town of Cardenas) (Ann. A, Attachment 85).
24 January 1984	(armed attack on town of El Castillo) (Ann. A, Attachment 95).

28 February 1984	(attacks on border zone of El Naranjo) (Ann. A, Attachment 98).
10 April 1984	(armed attacks on border post of San Juan del Norte) (Ann. A, Attachment 100).
11 April 1984	(continuing attacks on San Juan del Norte) (Ann. A, Attachment 102).
16 April 1984	(further attacks on San Juan del Norte) (Ann. A, Attachment 104).
28 April 1984	(invasion of San Juan del Norte) (Ann. A, Attachment 109) (see also *infra*, paras. 318, 319).
30 April 1984	(attacks on El Castillo and Cardenas) (Ann. A, Attachments 110 and 111).
7 May 1984	(attack on border post of Palo de Arco) (Ann. A, Attachment 116).
12 June 1984	(attacks on Machuca and Agua Fresca sector) (Ann. A, Attachment 124) (see also telegram of same date; Ann. A, Attachment 125).
30 September 1984	(attack on border post of Peñas Blancas) (Ann. A, Attachment 140).
18 October 1984	(attack on border post of San Pancho) (Ann. A, Attachment 149).
20 October 1984	(attack on border post of Peñas Blancas) (Ann. A, Attachment 151).
31 January 1985	(attack on "La Flor" estate) (Ann. A, Attachment 170).
18 February 1985	(attack on border post of Peñas Blancas) (Ann. A, Attachment 175).
19 February 1985	(attack on border post of El Naranjo) (Ann. A, Attachment 176).
1 March 1985	(attack on customs post of Peñas Blancas) (Ann. A, Attachment 181).
16 April 1985	(attack on border post of La Esperanza) (Ann. A, Attachment 184).
30 April 1985	(further attack on border post of La Esperanza) (Ann. A, Attachment 186).
21 June 1985	(attacks on La Penca sector) (Ann. A, Attachments 193 and 195).
2 July 1985	(continuing attacks on La Penca) (Ann. A, Attachment 196).
4 July 1985	(further attack on La Penca) (Ann. A, Attachment 198).
22 July 1985	(attacks on San Rafael sector) (Ann. A, Attachment 202).
31 July 1985	(attacks on Cano Machado and La Penca) (Ann. A, Attachment 204).
13 August 1985	(attacks on Colon sector and vicinity of Delta of San Juan River) (Ann. A, Attachment 207).
23 August 1985	(attack on border post at Boca de San Carlos, Río San Juan) (Ann. A, Attachment 211).
26 August 1985	(further attack on border post at Boca de San Carlos; attack on La Penca sector) (Ann. A, Attachment 212).
29 August 1985	(attack on border post of Peñas Blancas) (Ann. A, Attachment 214).
6 September 1985	(attack on Nicaraguan post in the Pimienta sector) (Ann. A, Attachment 218).

9 September 1985	(various armed attacks on Nicaraguan forces, including attacks on an air force plane and two helicopters) (Ann. A, Attachment 219).
17 September 1985	(attack on border post of Pueblo Nuevo) (Ann. A, Attachment 220).
28 September 1985	(attacks on three border posts) (Ann. A, Attachment 222).
3 October 1985	(attacks on La Penca sector) (Ann. A, Attachment 223).
7 October 1985	(attack on border post in San Carlos sector) (Ann. A, Attachment 224).
7 October 1985	(attack on Sarapiqui sector) (Ann. A, Attachment 225).
8 October 1985	(attack on Nicaragua from Delta sector, Río San Juan (C.R.)) (Ann. A, Attachment 226).
19 October 1985	(attack on border post of La Penca) (Ann. A, Attachment 229).
24 October 1985	(attack on La Penca sector) (Ann. A, Attachment 232).
1 November 1985	(two attacks (on the same day) on border post of Boca de San Carlos) (Ann. A, Attachment 233).
15 January 1986	(attack on border post of Sarapiqui) (Ann. A, Attachment 240).
17 January 1986	(attack on Nicaraguan helicopters overflying Sarapiqui and Boca de San Carlos sector) (Ann. A, Attachment 241).
20 January 1986	(attack on border post of Sarapiqui) (Ann. A, Attachment 242).
26 January 1986	(attack on Nicaraguan helicopter at La Penca border post) (Ann. A, Attachment 247).
31 January 1986	(attack on Nicaraguan positions in vicinity of Delta del Río San Juan sector by an aircraft coming from Costa Rica) (Ann. A, Attachment 249).
19 April 1986	(attack on Nicaraguan forces in border area near San Carlos) (Ann. A, Attachment 255).
31 May 1986	(attack on border post of San Juan del Norte) (Ann. A, Attachment 260).
6 June 1986	(attack on observation post of Las Conchitas) (Ann. A, Attachment 261).
26 August 1986	(attack on border post near El Castillo) (Ann. A, Attachment 265).

310. Indeed, in the period between December 1982 and August 1986 there were hundreds of separate attacks involving the use of assault weapons. (See *supra*, para. 5.) The repeated armed attacks reveal a pattern and, especially in the years 1984 and 1985, a constant campaign with a high incidence of attacks. In the circumstances the only proper inference is that the Costa Rican authorities tolerated and acquiesced in the operations of the *contras*.

(iii) *The character of the forces and weapons used*

311. The attacks described above varied in intensity, but they always took the form of operations by personnel trained in military skills and able to deploy and use a variety of heavy weapons. Those who executed the attacks were, in simple terms, armed forces of the *contra* organizations based in Costa Rica. The weapons regularly used included mortars, rocket launchers and automatic weapons. (See, for example, the Nicaraguan protest Notes dated 10 April 1984, 22 July 1985, and 7 October 1985. Ann. A, Attachments 101, 202, 225.)

312. On a number of occasions the attackers received support from aircraft and helicopters based in Costa Rica. (See the Nicaraguan protest Notes dated 2 December 1982, 28 September 1983, (telegram) 16 April 1984, 12 June 1984. Ann. A, Attachments 18, 67, 104, 124.)

(iv) *Related episodes*

313. The repeated armed attacks were accompanied by related episodes of a kind inevitably associated with the type of operations mounted against Nicaragua. Thus from time to time ARDE infiltrators were captured on Nicaraguan territory. (See the Nicaraguan protest Notes dated 9 May 1983, and 4 July 1983. Ann. A, Attachments 41, 55.) Similarly, illegal trespass by unidentified aircraft was a common phenomenon. (See the Nicaraguan protest Notes dated 9 September 1983, 18 October 1984, 26 July 1985. Ann. A, Attachments 59, 203, 211.) Kidnapping episodes also formed a natural part of the pattern. (See the Nicaraguan protest Notes dated 25 May 1983, 23 January 1984, 13 September 1984, 31 January 1985, 18 February 1985 and 26 April 1986. Ann. A, Attachments 48, 94, 133, 170, 174, 257.)

(v) *The receipt by Costa Rica of repeated complaints concerning* contra *operations and preparations for attacks*

314. The Government of Nicaragua has repeatedly protested to the Government of Costa Rica about the hostile activities of *contras* based in and operating from the territory of Costa Rica and the relevant Diplomatic Notes are listed paragraph 309. It was sometimes possible to give the Costa Rican authorities precise information of preparations for attack against targets within Nicaragua. (See the Nicaraguan Diplomatic Notes dated 21 October 1983, 22 November 1983, 30 April 1984, 5 October 1984, 15 October 1984, 19 October 1985. Ann. A, Attachments 80, 87, 110, 146, 148, 228.) Representations were also made on this score in meetings of the OAS, the Mixed Commission and the Commission of Supervision and Prevention. (See *supra*, para. 7.)

315. On a number of occasions urgent warnings from Nicaragua were followed by the attack the imminence of which had been the subject of the particular warning. This depressing sequence is visible in the following Diplomatic Notes:

19 October 1985	(information on mobilization of two groups of mercenaries in particular areas) (Ann. A, Attachment 228).
24 October 1985	(protest at the attack which resulted from the mobilization referred to in the previous Note) (Ann. A, Attachment 232).

316. On this occasion and generally in the months of July, August, September and October of 1985, there was a closely knit series of armed attacks related to protests by Nicaragua and requests that the Costa Rica Government take effective measures to prevent further attacks. There is no evidence that any steps were taken and the constant renewal of the *contra* attacks points clearly toward a long-maintained policy of co-operation on the part of the responsible organs of the Government of Costa Rica.

(vi) *Evidence of active co-operation by Costa Rican officials*

317. There is a substantial body of evidence of active co-operation by Costa Rican officials in the campaign of aggression organized and executed by the *contras*. This evidence will be fully recounted in the section on assistance and

complicity. (See *infra*, paras. 326-338.) This evidence is referred to here because it is relevant to the submission that the Respondent State bears direct responsibility for breach of the principle of the prohibition of the use of force.

(vii) *The assault on San Juan del Norte in April 1984*

318. If it were not clear to the Costa Rican authorities already, the situation resulting from playing host to large groups of *contras* was vividly portrayed by the events of April 1984, which culminated in the occupation of the Nicaraguan town of San Juan del Norte by more than 500 armed mercenaries from their bases in Costa Rica. The various stages of this episode were chronicled in a series of Nicaraguan Diplomatic Notes dated 10 April 1984, 11 April 1984, 16 April 1984, and 28 April 1984. (Ann. A, Attachments 101, 102, 104, 109.)

319. The scale of this operation and the general circumstances in which it took place provide strong indications of the approbation of the Costa Rican authorities. The situation developed over a period of many days, and clearly involved an operation aimed at the capture of San Juan del Norte. There is no evidence that the Costa Rican authorities took any measures, much less any effective measures, to prevent the development of this major aggression against Nicaragua. When the occupying force was expelled by Nicaraguan forces the *contras* retreated into Costa Rica. The official response of the Costa Rican Government in face of vigorous Nicaraguan protests (see *supra*, paras. 18, 68) provided no adequate explanation of Costa Rican passivity in face of the invasion and occupation of San Juan del Norte, and none was forthcoming either then or later. (Ann. A, Attachment 106 (Diplomatic Note of Costa Rica).) Costa Rica's sweeping denial of all responsibility for the invasion of San Juan del Norte is impossible to reconcile with the facts of the case. (See *supra*, para. 68.)

(viii) *Submission on the facts*

320. On the basis of the evidence set forth above the Government of Nicaragua submits that it is established that the Costa Rican Government and its agents had tolerated or acquiesced in the organization of ARDE within the territory of Costa Rica and its hostile operations against targets in Nicaragua. In the circumstances, such adoption and approbation of the operations concerned must engage a simple or direct responsibility for breach of the principle of the prohibition of the use of force, as elaborated *supra*, paragraphs 297-302.

2. *Responsibility Consequent upon Assistance to* Contras *Operating against Nicaragua and Complicity in Their Activities*

(a) *The law*

321. The submission of Nicaragua in the alternative is that the policy of the Costa Rican Government in providing active co-operation and assistance to the *contras* operating from its territory results in the existence of State responsibility on the basis of complicity in the acts of persons not formally acting on the State's behalf. The responsibility thus arising would be for breaches of the principle of the prohibition of the use of force, but the precise axis or generator of responsibility is the element of complicity in the acts of persons outside the apparatus of the State.

322. It has long been recognized both in the doctrine and in practice that a State may be made responsible for the acts of persons who are not attached to the organs of the State. (See, for example, *Répertoire suisse*, Vol. III, *supra*,

pp. 1724-1743; Kiss, III *Répertoire de la pratique française* (Paris, 1965), pp. 579-636; H. Accioly, "Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", 96 *Hague Recueil* (1959-I), pp. 404-407; E. Jiménez de Aréchaga, "International Responsibility", pp. 558-562, in M. Sørensen, *Manual of Public International Law, supra*; Whiteman, 8 *Digest of International Law*, pp. 815-819, 830-835; I. Brownlie, *System of the Law of Nations, State Responsibility*, Part I (Oxford, 1983), p. 159.

323. This principle was adopted by Judge Ago, then Rapporteur of the International Law Commission, in his fourth report. See *Yearbook of the International Law Commission*, 1972, Vol. II, A/CN.4/Ser.A/1972/Add.1, pp. 95-126. Article 11 of the draft proposed by Judge Ago was as follows:

> "*Article 11. Conduct of private individuals*
>
> 1. The conduct of a private individual or group of individuals, acting in that capacity, is not considered to be an act of the State in international law.
>
> 2. However, the rule enunciated in the preceding paragraph is without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish the conduct of the individual or group of individuals and failed to do so." (*Id.*, at 126.)

324. The final version of this Article, as adopted by the Commission in 1975, is as follows:

> "*Article 11. Conduct of persons not acting on behalf of the State*
>
> 1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.
>
> 2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10." (*Yearbook of the International Law Commission*, 1975, Vol. II, A/CN.4/Ser.A/1975/Add.1, pp. 70-83.)

325. The alteration in the drafting does not appear to indicate any important change in the substance. The essence of the matter is the existence of acts or omissions on the part of the organs of the State which, given the nature of the particular obligation of international law in question, results in a responsibility for a failure to exercise adequate control over the actions of private persons. (See *id.*, p. 71.) In the case of mob violence, the activities of terrorists or the operations of *contras* based within the territory of the State, it has for long been recognized that the territorial sovereign will be responsible for the consequences of activities of which it had either actual knowledge or the means of knowledge. The existence of this type of responsibility will be easier to establish in circumstances in which the territorial sovereign extends co-operation and assistance to the persons or groups in question.

(b) *The facts*

326. To establish the complicity of the Costa Rican Government in the operations of the *contras* against the southern territories of Nicaragua, on grounds of ordinary legal logic, four indicia are relevant:

(i) the existence of control in the relevant zones or an ability to exercise control;
(ii) knowledge of the presence of *contras* and of their aims and methods;
(iii) knowledge of the operations of the *contras* and the consequences of such operations; and
(iv) the giving of co-operation and active assistance to the contras in the execution of their policy of violence directed against Nicaragua.

327. In approaching the evidence of Costa Rican complicity the attention of the Court is respectfully drawn to the statement of the Court in the *Corfu Channel* case (Merits) on the role of indirect evidence in cases in which key facts in issue involve activities within the territory of the respondent State. The pertinent passage in the Judgment is as follows:

> "It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were the victims. It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.
>
> On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion." (*I.C.J. Reports 1949*, para. 4, p. 18.)

(i) *The existence of control*

328. There is a presumption that a sovereign State exercises control within its frontiers with certain well-known exceptions, such as the subjection of a part of its territory to belligerent occupation, such exceptions having no relevance in the present case. In any case in face of frequent protests from Nicaragua in face of *contra* actions, the Government of Costa Rica has expressly asserted that it is exercising "absolute" and "effective" control over the frontier zones. (See, for example, Diplomatic Notes of Costa Rica dated 18 April 1984, 24 August 1984, 17 September 1984, 21 September 1984, 1 October 1984, 4 October 1984, 15 October 1985, and 23 January 1986 (Ann. A, Attachments 106, 131, 137, 138, 142, 144, 148, 245).)

(ii) *Knowledge of the presence of the organizations in question*

329. The presence of the *contras* within Costa Rica and their policies towards the Government of Nicaragua were matters of public knowledge throughout the material period; and reference may be made to the public statements and press conferences of *contra* leaders, together with press advertisements concerning *contra* activities and goals. (See Ann. E, Attachments 2, 3, 4.)

(iii) *Knowledge of the operations of the* contras

330. There is a vast range of evidence to the effect that the Government of Costa Rica had extensive knowledge of the operations carried out by the *contras* based in Costa Rica against targets in Nicaragua and the precise consequences of those operations. The evidence of that knowledge takes the following forms.

(A) The long series of diplomatic protests received from Nicaragua

331. Costa Rica received a long series of protests from the Nicaraguan Foreign Ministry relating to particular attacks (see *supra*, para. 309) and on many occasions the Nicaraguan Government gave the Costa Rican authorities precise information about preparations for attacks. (See *supra*, para. 7. Also see Ann. B.)

(B) Statements of Costa Rican Ministers

332. In diplomatic correspondence the Foreign Minister of Costa Rica did not seek to deny the presence of ARDE and its leaders in Costa Rica and, indeed, it was asserted that their status was that of political asylees. (See the Costa Rican Notes dated 10 January 1983, 18 April 1984, Ann. A, Attachments 23, 106.)

(C) Reports and statements of Costa Rican administrative officials

333. In a number of public statements Costa Rican officials have made significant admissions against interest. The evidential weight of such admissions was recognized by the Court in *Nicaragua* v. *United States*, *supra*, pp. 41, 143. Thus, in January 1982, the Minister of Public Security and Administration, Arnulfo Carmona Benavides, made statements reported in the Costa Rican press in which he confirmed the existence of *contra* camps on the northern border. (See Ann. H, Attachment 2.) The existence and nature of *contra* operations was acknowledged in reports of the Ministry of Public Security of Costa Rica. (See, for example, Ann. D, Attachments 6, 7.)

(D) Public statements by *contra* leaders

334. On several occasions *contra* leaders have made public statements claiming responsibility for particular operations. (See, e.g., *supra*, paras. 36, 39, 55.)

(E) Meetings of the Mixed Commission and the Commission of Supervision and Prevention

335. During meetings of the OAS Investigating Committee the Mixed Commission and, subsequently, of the Commission of Supervision and Prevention, the Nicaraguan representatives gave detailed information concerning *contra* attacks and organization. (See Ann. B, Attachments 1-3.)

(iv) *The general pattern of connected incidents*

336. An important aspect of the evidence is the existence of a coherent pattern of connected incidents, statements of intention by *contra* leaders, and the repeated protests of the Nicaraguan Government over a period of five years.

(v) *Co-operation and assistance given to the* contras *by Costa Rica*

337. Whilst the policies and conduct of particular Costa Rican officials in face of the covert war against Nicaragua were not always very consistent, there is a significant body of evidence of acts of direct co-operation and assistance on the part of members of the Costa Rican administration. Such acts of positive co-operation went beyond the acquiescence and passivity which were also familiar features of Costa Rican official attitudes.

338. The evidence of direct co-operation and assistance includes the following items:

(A) In a Note dated 28 April 1984 (Ann. A, Attachment 109), Nicaragua gave substantial details of the complicity of senior Costa Rican officials in *contra* military operations. In particular, the Government of Nicaragua pointed out that the invasion of San Juan del Norte would not have been possible had it not been for the long-term collaboration of sectors of the Costa Rican administration. *(Id.)* The annex to the Note refers, *inter alia*, to the role of Vice-Minister Chacon of Costa Rica in providing assistance to the *contras*. *(Id.)*

(B) The readiness of Costa Rican officials in the frontier region to prepare the way for *contra* attacks by evacuating customs and immigration posts on the frontier is pointed out in the Nicaraguan Note dated 3 May 1984. (Ann. A, Attachment 113.) The complicity in these circumstances was that of the Rural Guard. In a further Note dated 7 May 1984 (Ann. A, Attachment 116), the acquiescence of the Rural Guard in face of *contra* operations was again the subject of complaint by Nicaragua.

(C) In April 1985 five foreign mercenaries were captured in Costa Rica. In a series of statements, these mercenaries described the active collaboration received from the security forces of Costa Rica. The details have been set forth *supra*, paragraph 97. The revelations formed the subject of a Nicaraguan protest dated 3 July 1985. (Ann. A, Attachment 197.)

(D) It was not unusual for armed attacks from Costa Rica to take place in the actual vicinity of frontier posts manned by the Costa Rican Civil Guard. See, for example, the Nicaraguan Notes dated 8 October 1985, and 1 November 1985. (Ann. A, Attachments 226, 233.)

(E) The evidence provided by the Joint Congressional Hearings on the Iran-Contra Affair includes unequivocal indications that the President of Costa Rica (President Monge) and other senior officials actively collaborated in the creation of an airbase and related facilities to be used by United States agents for logistical operations in support of *contra* operations within the territory of Nicaragua. (See *supra*, paras. 9, 23, 24, 108, 109, 113, 115.)

(F) The willingness of the Costa Rican authorities to set *contra* personnel at liberty without investigation of their criminal activities when, exceptionally, such persons had been detained by Costa Rican security agents. (See, e.g., *supra*, para. 17.)

(G) The evidence of internal documents of the Ministry of Public Security of Costa Rica to the effect that the existennce of *contra* encampments and concentrations were well known to the security agencies of the respondent State. (See *supra*, paras. 10, 11, 48.)

(vi) *Submission on the facts*

339. The evidence set forth above amply justifies the submission that the Government of Costa Rica is responsible on the basis of complicity in the acts of the *contras* established in its territory, as a consequence of the active co-operation and assistance provided by its officials. The existence of such complicity is the foundation of responsibility for breaches of the principle of the prohibition of the use of force.

340. The precise indicia or elements of Costa Rican complicity relevant to responsibility for such breaches and sustained by the evidence are:

(i) the existence of control — or at the least the means of control — within the relevant areas;
(ii) knowledge of the presence and purposes of the *contras* within Costa Rica;
(iii) knowledge of the operations of the *contras* directed against targets in Nicaragua; and
(iv) the giving of assistance to the *contras* in the execution of their policy of violence directed against Nicaragua.

3. *Responsibility Consequent upon Breaches of the Duty to Exercise Due Diligence in the Control of Activities within the Territory of the State*

(a) *The law*

341. In the submission of Nicaragua, general international law contains a principle according to which a State has a duty to use due diligence in order to control sources of injury to other states existing within its territory, and must bear legal responsibility if another State suffers injury as a consequence of breaches of that duty. The duty is dependent upon the existence of knowledge or the means of knowledge of the source of harm.

342. The existence of this duty has been recognized by international tribunals in the decisions in the *Trail Smelter Arbitration*, *Reports of International Arbitral Awards*, Vol. III (1941), p. 1905; and the *Corfu Channel* Case (Merits), *supra*, p. 22. In the latter case the Court referred to "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".

343. No doubt the duty to exercise due diligence is in some respects similar to the type of responsibility which arises from assistance and complicity in relation to armed bands. (See *supra*, Chaper III.) However, the principles are recognized as having a distinct identity in the authorities; and there are certain significant differences. A difference which is relevant for present purposes lies in the fact that the duty to exercise due diligence does not involve such a high standard as in the case of assistance and complicity for, after all, a failure to control, however grievous the consequences, cannot be equated with the higher degree of advertence associated with active co-operation and complicity.

(b) *The facts*

344. The criteria which are pertinent in establishing the existence of a failure to exercise due diligence are to some extent the same as those relevant to responsibility by way of complicity. However, the relevant criteria are restricted to two, as follows:

A. the existence of control in the relevant zones or at least an ability to exercise control; and

B. knowledge of the presence of the *contras* and of their aims and methods.

345. Indeed, the first of these criteria is essentially *pro forma* since control is assumed to exist over national territory and in any case the duty to exercise due diligence is not conditioned by the *fact* of control but by the *duty* to exercise effective control in the particular circumstances. It is also to be noted that the third "complicity" criterion namely, knowledge of the operations of the *contras*, is not strictly speaking a condition of responsibility for failure to exercise due diligence. However, such knowledge may have a significant evidential role as providing corroboration of the failure to exercise due diligence.

346. From these considerations it must follow that the references to the relevant evidence may be found in the preceding section as follows:

(i) Knowledge of the presence of the *contras* and of their aims and methods. (See *supra*, paras. 10, 11, 48.)
(ii) (As corroboration) knowledge of the operations of the *contras. (Id.)*

347. The existence of serious and persistent breaches of the duty to exercise due diligence is confirmed by the fact that the many diplomatic protests addressed to Costa Rica by Nicaragua contained requests that the Costa Rican Government should improve the methods of control and vigilance within the border zones. The need for appropriate means of communication and control in the border zone was stressed in a Note dated 2 December 1982. (Ann. A, Attachment 18.) Similar requests were made at frequent intervals in the following four years. (See, for example, the Notes dated 3 July 1983, 6 November 1983, 5 December 1983, 16 April 1984, 28 April 1984, 20 October 1984, 18 February 1985, 21 June 1985, 3 July 1985, 3 October 1985, 20 January 1986, 31 May 1986 and 26 August 1986, Ann. A, Attachments 53, 82, 88, 104, 109, 151, 175, 193, 197, 223, 242, 260, 265.)

(i) *Submission on the facts*

348. On the basis of the foregoing, Nicaragua submits that there is overwhelming proof of persistent breaches of the duty to exercise due diligence beginning in 1982 and continuing since then. There was a duty incumbent on Costa Rica to exercise a level of control and supervision of the national territory appropriate in the circumstances. The incidence and specific content of the duty was determined by the actual incidence of attacks against Nicaragua, and by knowledge of the presence of *contras* and of their aims and methods. The existence of the breaches of the duty for which Costa Rica is responsible is confirmed by the pattern of attacks repeated over a long period, by major episodes like the attack on San Juan del Norte, and by the frequent requests from Nicaragua for the improvement of methods of control and prevention. The breaches receive further confirmation, if such confirmation were necessary, from the evidence of actual knowledge of the operations of the *contras*. (See *supra*, paras. 10, 11, 48.)

C. Conclusion on the Use of Force

349. On the basis of the evidence available, the respondent State bears legal responsibility in the respect of its toleration of and assistance to those activities of the *contras* based in Costa Rica and operating against Nicaragua (and in some cases operating within its territory) which involved the use of force in the form of armed attacks directed against Nicaraguan targets.

350. These activities constitute serious and persistent breaches of the following legal obligations:

A. the obligation of States under general international law to refrain from the threat or use of force against the territorial integrity and political independence of any State,

B. the same obligation as expressed in Article 2, paragraph 4, of the United Nations Charter,

C. the provisions of Articles 18 and 19 of the Charter of the Organization of American States, which provisions may be regarded both as declaratory of the relevant principles of general international law and as constituting independently valid multilateral treaty obligations.

PART FOUR

BREACHES OF OTHER OBLIGATIONS OF GENERAL INTERNATIONAL LAW

CHAPTER VI. BREACHES OF THE OBLIGATION NOT TO VIOLATE THE SOVEREIGNTY OF ANOTHER STATE

A. Introduction

A. The Application (para. 21) states that "the policy of assistance to the armed bands of somocistas adopted by Costa Rica . . . constituted breaches of the obligation not to violate the sovereignty of another State". The issues of responsibility evoked by this formulation will be explored forthwith.

B. The Legal Principle

B. The obligation not to violate the sovereignty of another State is well recognized and it will suffice, by way of memorandum only, to set out the relevant passage from the Judgment of the Court in *Nicaragua* v. *United States*:

> "212. The Court should now mention the principle of respect for State sovereignty, which in international law is of course closely linked with the principles of the prohibition of the use of force and of non-intervention. The basic legal concept of State sovereignty in customary international law, expressed in, *inter alia*, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. As to superjacent air space, the 1944 Chicago Convention on Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory. That convention, in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982. The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and long-standing tenets of customary international law." (*I.C.J. Reports 1986*, p. 111.)

C. The Application of the Legal Principle

C. According to the normal operation of the principles of State responsibility, the respondent State will bear responsibility for the breaches of the obligation not to violate the sovereignty of Nicaragua on three separate bases, that is to say:

(a) direct responsibility for breaches of the obligation;
(b) responsibility by way of assistance to the *contras* and complicity in their activities; and
(c) responsibility consequent upon breaches of a duty to exercise due diligence in the control of activities within the national territory.

D. As the Court had occasion to observe in its Judgment in *Nicaragua* v. *United States*:

> "251. The effects of the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention. Thus the assistance to the *contras*, as well as the direct attacks on Nicaraguan ports, oil installations, etc., referred to in paragraphs 81 to 86 above, not only amount to an unlawful use of force, but also constitute infringements of the territorial sovereignty of Nicaragua, and incursions into its territorial and internal waters. Similarly, the mining operations in the Nicaraguan ports not only constitute breaches of the principle of the non-use of force, but also affect Nicaragua's sovereignty over certain maritime expanses. The Court has in fact found that these operations were carried on in Nicaragua's territorial or internal waters or both (paragraph 80), and accordingly they constitute a violation of Nicaragua's sovereignty. The principle of respect for territorial sovereignty is also directly infringed by the unauthorized overflight of a State's territory by aircraft belonging to or under the control of the government of another State." (*Id.*, p. 128.)

E. It follows that, in terms of the presentation of evidence relating to the three bases of responsibility indicated above, the convenient method of proceeding is to refer to the materials set forth in Part One and also in the previous Chapter of this Memorial, relating to the obligation not to use force. The specific breaches of that obligation there elaborated also constitute violations of the sovereignty of Nicaragua for which the respondent State bears responsibility.

CHAPTER VII. BREACHES OF THE OBLIGATION NOT TO KILL, WOUND, OR KIDNAP THE CITIZENS OF OTHER STATES

A. Introduction

A. In paragraph 22 of the Application Nicaragua formulates the claim that the conduct of Costa Rica "constitutes serious and persistent breaches of the obligation under customary international law not to kill, wound or kidnap the citizens of other States", and this claim will receive the necessary elaboration in the present section of the Memorial.

B. The Legal Principle

B. The relevant cause of action can be expressed as the killing, wounding or kidnapping of the citizens of Nicaragua without lawful justification. The legal bases of such a claim consist of a wealth of jurisprudence of claims commissions and instances of State practice. The Court's attention is respectfully drawn to the following materials:

(a) On the extensive practice of claims commissions, see, e.g., Feller, *The Mexican Claims Commissions 1923-1934*, Chapter 7 (1935); J. H. W. Verzijl, *International Law in Historical Perspective*, Vol. VI, pp. 6, 7 ff. (1973).

(b) For the practice of States, see Whiteman, 8 *Digest of International Law*, pp. 850-906 (1967); *Répertoire suisse de droit international public*, Vol. III, pp. 1710-1722 (1975).

(c) The views of qualified publicists, including Jiménez de Aréchaga, 159 *Hague Recueil* (1978-I), pp. 267 ff.; Oppenheim, *International Law* (H. Lauterpacht, ed.), Vol. I, 357-364, Vol. II, 941-952, 8th ed. (1955); D. P. O'Connell, *International Law*, 2nd ed. (1970); Jiménez de Aréchaga, in Sørensen (ed.), *Manual of Public International Law, supra*, pp. 531, 544-547 (1968); Guggenheim, *Traité de droit international public*, Vol. II, pp. 1-11 (1954); American Law Institute, *Restatement (Second): Foreign Relations Law of the United States*, paras. 164-168 (1956).

C. There can be little doubt that the obligation of customary law not to kill, wound, or kidnap the nationals of other States applies to such persons not only when they are present within the territory of the Respondent State but also when they are outside the territory. This assumption lies behind the claim presented to the British Government by the United States in the Caroline incident. (See R. Y. Jennings, "The Caroline and McLeod Cases", 32 *American Journal of International Law* 82 (1938).) The application of the duty in respect of aliens outside the territorial jurisdiction is recognized by O'Connell, *International Law, supra*, Vol. II, p. 950.

D. The broad application of the duty is evident in the cases relating to the destruction of civil aircraft. It may be that the location of the aircraft at the relevant time is relevant to an issue of excusable error, but there can be no doubt that the duty not to use force against foreign aircraft is not conditioned by the position of the aircraft inside or outside the territorial airspace of the Respondent State. In such cases the Respondent State is liable for the killing and wounding of the passengers and crew. (See, e.g., Whiteman, 8 *Digest of International Law*, pp. 885-906 (1967).) The same principle appears in the practice of States concerning harm to nationals caused by frontier guards. (See 3 *Italian Yearbook of International Law*, pp. 435-437 (1977).)

E. A further legal consideration relates to the force and relevance of the fundamental norms protecting human rights, which must apply equally to foreign nationals, whether they are harmed within or without the territory of the Respondent State, provided that State is responsible for the death, injury or kidnapping. In the *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain) (Second Phase), I.C.J. Reports 1970*, p. 3, the Court referred in its Judgment to "obligations *erga omnes*", which included the "principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination". (*Id.*, p. 32.)

F. Of considerable significance is the fact that Whiteman's *Digest, supra*, an official United States publication, includes a series of prescriptions concerning human rights in the section devoted to "State responsibility for injuries to aliens". (See Vol. 8, pp. 697, 904-906.) The prescriptions set forth by Whiteman include the right to life, liberty, and security of the person.

G. In the specific case of unlawful detention of aliens, there is a considerable quantity of material evidencing the application of the international obligation to cases of wrongful detention by agents of the State. (See, for example, Whiteman, *supra*, Vol. 8, pp. 863-885; and the Liechtenstein Application in the *Nottebohm* case *(Liechtenstein* v. *Guatemala) (Preliminary Objection), I.C.J. Reports 1953*, pp. 112-113; and see also *id. (Second Phase), I.C.J. Reports 1955*, pp. 6-7.) In the case concerning *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, pp. 3, 30-31, 32-33, the Court referred to the "obligations under general international law" concerning the treatment of aliens.

H. One final observation on the legal aspects of the claim for the killing, wounding, and kidnapping of Nicaraguan citizens is merited. Such acts must surely fall within the concept of the use of force which is prohibited by the norm of general international law reflected in Article 2 (4) of the United Nations Charter. In this connection it may be noted that the United States Application in the *Tehran* case invoked the provisions of that Article. (See *id.*, pp. 5-6.)

I. The evidence of the breaches of the obligation not to kill, wound or kidnap the citizens of Nicaragua, for which Costa Rica is responsible, is substantially the same as the evidence indicated previously in relation to violations of sovereignty and breaches of the obligation not to resort to the use or threat of force. Consequently, it is not necessary to repeat those indications.

SUBMISSIONS

J. The Republic of Nicaragua respectfully requests the Court to grant the following relief:

First: the Court is requested to adjudge and declare that Costa Rica has violated the obligations of international law indicated in this Memorial, namely:

- *(a)* the obligation of general international law not to intervene in the affairs of other States, which obligation is also expressed in the law and practice of the United Nations;
- *(b)* the obligations of non-intervention set forth in Article 18 of the Charter of the Organization of American States;
- *(c)* the obligation of non-intervention embodied in the Charter of the United Nations;
- *(d)* the obligations set forth in the Treaty of Amity concluded between the Parties on 21 February 1948 and the Agreement implementing Article IV of the aforesaid instrument, concluded on 9 January 1956;
- *(e)* the obligations set forth in the Convention on Rights and Duties of States in the Event of Civil Strife, concluded on 20 February 1928;
- *(f)* the obligation of general international law to refrain from the threat or use of force against the territorial integrity and political independence of any State, which obligation is also expressed in Article 2, paragraph 4, of the United Nations Charter;
- *(g)* the provisions of Articles 18 and 20 of the Charter of the Organization of American States, which provisions may be regarded as declaratory of the principles of general international law, and which include obligations relating to the use of force;
- *(h)* the obligation of general international law not to violate the sovereignty of other States; and
- *(i)* the obligation of general international law not to kill, wound or kidnap the citizens of other States.

Second: the Court is requested to state the duty of the Government of Costa Rica to bring the aforesaid violations of international law to an end.

Third: the Court is requested to adjudge and declare that, in consequence of the violations of international law indicated in this Memorial, compensation is due to Nicaragua, both on its own behalf and in respect of wrongs inflicted upon its nationals; and the Court is requested further to receive evidence and to determine, in a subsequent phase of the present proceedings, the quantum of damages to be assessed as the compensation due to the Republic of Nicaragua.

K. Accordingly, this copy of the Memorial is certified as original and presented on behalf of the Republic of Nicaragua.

Respectfully submitted,
Carlos ARGÜELLO GÓMEZ,
Agent of the Republic of Nicaragua.

10 August 1987.

LIST OF ANNEXES[1] TO THE MEMORIAL OF NICARAGUA

Annex A. DIPLOMATIC CORRESPONDENCE BETWEEN NICARAGUA AND COSTA RICA

Attachments

1. Diplomatic Note of Nicaragua, 16 April 1982
2. Diplomatic Note of Nicaragua, 10 May 1982
3. Diplomatic Note of Nicaragua, 21 May 1982
4. Diplomatic Note of Costa Rica, 22 May 1982
5. Diplomatic Note of Costa Rica, 7 June 1982
6. Diplomatic Note of Costa Rica, 8 June 1982
7. Diplomatic Note of Costa Rica, 8 June 1982
8. Diplomatic Note of Nicaragua, 9 June 1982
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265. Diplomatic Note of Nicaragua, 26 August 1986
266. Diplomatic Note of Nicaragua, 3 September 1986
267. Diplomatic Note of Nicaragua, 24 November 1986
268. Diplomatic Note of Nicaragua, 27 November 1986
269. Diplomatic Note of Costa Rica, 18 February 1987
270. Diplomatic Note of Nicaragua, 21 February 1987
271. Diplomatic Note of Costa Rica, 25 February 1987
272. Diplomatic Note of Nicaragua, 2 March 1987
273. Diplomatic Note of Nicaragua, 11 March 1987
274. Diplomatic Note of Costa Rica, 16 March 1987
275. Diplomatic Note of Costa Rica, 14 April 1987
276. Diplomatic Note of Nicaragua, 3 June 1987
277. Diplomatic Note of Costa Rica, 22 June 1987
278. Diplomatic Note of Costa Rica, 24 June 1987
279. Diplomatic Note of Nicaragua, 29 June 1987
280. Diplomatic Note of Nicaragua, 2 July 1987.

Annex B. MATERIALS OF THE OAS INVESTIGATING COMMITTEE, THE MIXED COMMISSION AND COMMISSION OF SUPERVISION AND PREVENTION

Attachment 1. Documents of Mixed Commission
Attachment 2. Documents of Commission of Supervision and Prevention
Attachment 3. Annex 9 to Report of the Fact-Finding Committee Established by the OAS Permanent Council to Investigate the Complaint Filed by the Minister of Foreign Affairs of Costa Rica.

Annex C. RECORDS OF THE GOVERNMENT OF NICARAGUA

Attachment 1. Chronology of Selected Acts of Aggression against Nicaragua from Costa Rican Territory, 1982-1986
Attachment 2. Chronology of Acts of Aggression against Nicaragua from Costa Rican Territory, April-September 1983
Attachment 3. Chronology of Acts of Aggression against Nicaragua from Costa Rican Territory, January-April 1984
Attachment 4. Records of Ministry of Interior on *Contra* Bases, Command Centers, and Support in Costa Rica
Attachment 5. Tables Summarizing *Contra* Activity on Costa Rican Territory
  1. *Contra* Camps in Costa Rica, 1984-1987
  2. *Contra* Airfields in Costa Rica, 1984
  3. Locations of *Contra* Forces on Costa Rican Territory, 1985-1986
Attachment 6. Ministry of Foreign Affairs Internal Telex, 26 May 1983.

Annex D. RECORDS OF MINISTRY OF PUBLIC SECURITY OF COSTA RICA

Attachment 1. Letter from Lt. Col. Rodrigo Rivera Saborio to Minister of Public Security Angel Edmundo Solano Calderón, 3 August 1983
Attachment 2. Report from Capt. Antonio Castrillo Medina to Lt. Col. Rivera Saborio, 6 August 1983
Attachment 3. Letter from Lt. Col. Rivera Saborio to Vice-Minister Johnny Campos, 5 August 1983
Attachment 4. Report from Sub-Lieutenant Medrano to Lt. Col. Rivera Saborio, 5 August 1983
Attachment 5. Memorandum from Lt. Col. Carlos Monge Quesada to Minister of Public Security Solano Calderón, 30 August 1983
Attachment 6. Memorandum [1] from Lt. Col. Mario Araya to Vice-Minister Johnny Campos, 29 August 1983
Attachment 7. Memorandum [2] from Lt. Col. Mario Araya to Vice-Minister Johnny Campos, 29 August 1983
Attachment 8. Memorandum from Lt. Col. Carlos Monge Quesada to Minister of Public Security Solano Calderón, 24 February 1984.

Annex E. PUBLICATIONS OF *CONTRA* ORGANIZATIONS BASED IN COSTA RICA

Attachment 1. "B.O.S. — Opposition Bloc of the South", San José 1985
Attachment 2. Paid Advertisements in Costa Rican Periodicals

1. *La Nación*, 20 June 1982
2. *La República*, 21 June 1982
3. *La Nación*, 23 September 1982
4. *La Prensa Libre*, 25 September 1982
5. *La Nación*, 25 September 1982
6. *La Nación*, 6 October 1982
7. *La Nación*, 1 December 1982
8. *La Nación*, 5 December 1982
9. *La Nación*, 13 December 1982
10. *La Nación*, 17 December 1982
11. *La Prensa Libre*, 17 December 1982
12. *La República*, 17 December 1982
13. *La Nación*, 19 December 1982
14. *La Nación*, 23 December 1982
15. *La Nación*, 24 December 1982
16. *La Prensa Libre*, 9 January 1984
17. *La República*, 13 June 1985
18. *La Nación*, 2 August 1985
19. *La República*, 26 July 1986
20. *La Nación*, 9 October 1986
21. *La República*, 3 June 1986
22. *La Nación*, 28 February 1985
23. *La Nación*, 14 October 1983
24. *La Prensa Libre*, 15 September 1983

Attachment 3. *Liberación*

1. "'Negro' Chamorro Declares: Unity Has Been Consolidated", 10 July 1986
2. "UNO and BOS Sign Accord", 10 July 1986
3. "19 of July Repudiated", 25 July 1986
4. "War is the Fault of the Sandinistas", 25 July 1986

5. "UNO-FDN Wage 32 Battles in 15 Days", 25 July 1986
6. "UNO-FDN Graduates 1,200 New Combatants", 25 July 1986
7. "Third Meeting of UNO Assembly", 25 October 1986
8. "We Will Continue to Support Our Fighters", 25 October 1986

Attachment 4. *Nicaragua Hoy*

1. "Resistance Responds to the Decision of Congress", 11 May 1985
2. "Members of the Military: Don't Fight; Surrender or Join Us, says Enrique Bermudez", 11 May 1985
3. "Chronology of Activities of the Nicaragua Resistance Regarding the National Dialogue", 11 May 1985
4. "Opposition Unity Is Strengthened", 14 June 1986
5. "Bermudez Emphasizes the Importance of UNO before 1,000 New Graduates of UNO-FDN", 14 June 1986
6. "Ambassador Tambs Visits UNO Offices", 14 June 1986
7. 29 November 1986, pp. 1-3
8. "Document of Democratic Agreement of the Nicaraguan Resistance", 24 January 1987.

Annex F. OFFICIAL DOCUMENTS OF THE UNITED STATES GOVERNMENT

Attachment 1. *Dictionary of International Relations Terms*, Department of State (3rd ed., 1987)

Attachment 2. Report of the President's Special Review Board (Tower Commission Report), 26 February 1987

Attachment 3. Joint Hearings on the Iran-Contra Investigation, Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and House Select Committee to Investigate Covert Arms Transactions with Iran

1. Testimony of Lewis A. Tambs
2. Testimony of Joe Fernandez ("Tomás Castillo")
    - *(a)* Exhibit to Testimony of Joe Fernandez ("Tomás Castillo") (Exhibit TC)
3. Testimony of Elliot Abrams
4. Testimony of Robert W. Owen
    - *(a)* Exhibits to Testimony of Robert W. Owen (Exhibit RWO)
5. Testimony of Vice Admiral John Poindexter
6. Exhibits to Testimony of Oliver L. North (Exhibit OLN)

Attachment 4. "Preliminary Inquiry into the Sales of Arms to Iran and Possible Diversion of Funds to the Nicaraguan Resistance", a Report of the Senate Committee on Intelligence, United States Senate, 2 February 1987

Attachment 5. "'Private Assistance' and the Contras: A Staff Report", Staff of Senator John Kerry, 14 October 1987

Attachment 6. Weekly Intelligence Summary, Defense Intelligence Agency, 16 July 1982.

Annex G. RECORDS OF COURT PROCEEDINGS

Attachment 1. *Criminal Proceeding against Eugene Hasenfus*, Popular Anti-Somoza Tribunal of the First Instance, 16 October 1986 (Testimony of Eugene Hasenfus)

Attachment 2. *John Hull* v. *Anthony Avirgan and Martha Honey*, First Penal Court of San José, Costa Rica, 3 October 1985 (Record of Testimony and Judgment of the Court)

Attachment 3. *Proceedings for the Extradition of Francisco López Arce and Camilo Martin Walter Hurtado*, Criminal Court of Limon, Costa Rica, 7 October 1982; affirmed, Supreme Court of Costa Rica, 15 October 1982 (Judgment of the Court)

Attachment 4. *Proceedings against Rafael León Blandón for the Homicide of Denis Javier Sandoval M.*, Trial Court of San Carlos, Costa Rica, 7 December 1984 (Report of Fausto Rojas Cordero (Supervisor) and Carlos L. Canabria Porras (Investigator) of the Judicial Investigation Agency of San Carlos; Sworn Statement of Jorge García García; and Statement of Rafael Leon Blandon).

Annex H. COSTA RICAN PRESS REPORTS

Attachments

1. *La Prensa Libre*, 12 January 1982
2. *La República*, 12 January 1982
3. *La Nación*, 15 January 1982
4. *La Prensa Libre*, 15 February 1982
5. *La República*, 8 April 1982
6. *La Nación*, 8 April 1982
7. *La República*, 16 April 1982
8. *La Prensa Libre*, 16 April 1982
9. *La Nación*, 17 April 1982
10. *La Prensa Libre*, 17 April 1982
11. *La Prensa Libre*, 13 May 1982
12. *La Nación*, 14 May 1982
13. *La Prensa Libre*, 14 May 1982
14. *La Nación*, 15 May 1982
15. *La República*, 23 May 1982
16. *La Nación*, 1 June 1982
17. *La Nación*, 18 June 1982
18. *La República*, 25 July 1982
19. *La Nación*, 25 July 1982
20. *La República*, 9 September 1982
21. *La Nación*, 19 September 1982
22. *La República*, 7 October 1982
23. *La Prensa Libre*, 3 November 1982
24. *La Prensa Libre*, 3 November 1982
25. *La República*, 4 November 1982
26. *La Prensa Libre*, 4 November 1982
27. *La Prensa Libre*, 5 November 1982
28. *La República*, 5 November 1982
29. *La Nación*, 10 February 1983
30. *La República*, 5 April 1983
31. *La República*, 9 September 1983
32. *La Prensa Libre*, 13 September 1983
33. *La República*, 15 September 1983
34. *La Nación*, 24 September 1983
35. *La Prensa Libre*, 4 October 1983
36. *La República*, 5 October 1983
37. *La Nación*, 31 January 1984
38. *La República*, 31 January 1984
39. *La Nación*, 2 February 1984

40. *La Prensa Libre*, 3 March 1984
41. *La Prensa Libre*, 7 April 1984
42. *La República*, 8 April 1984
43. *La Nación*, 9 April 1984
44. *La República*, 11 April 1984
45. *La Prensa Libre*, 13 April 1984
46. *La Nación*, 16 April 1984
47. *La Prensa Libre*, 18 April 1984
48. *La Nación*, 8 May 1984
49. *La Prensa Libre*, 17 May 1984
50. *El Debate*, 30 May 1984
51. *La Nación*, 31 May 1984
52. *La Nación*, 31 May 1984
53. *La Prensa Libre*, 31 May 1984
54. *La República*, 1 June 1984
55. *La Nación*, 1 June 1984
56. *El Debate*, 1 June 1984
57. *La Nación*, 9 September 1984
58. *La República*, 8 May 1985
59. *La República*, 4 July 1985
60. *La Prensa Libre*, 13 May 1986
61. *La Nación*, 15 May 1986
62. *La Nación*, 4 June 1986
63. *La República*, 23 November 1986
64. *La República*, 16 December 1982
65. *La Nación*, 3 November 1984.

Annex I. UNITED STATES AND OTHER FOREIGN PRESS REPORTS

Attachments

1. Foreign Broadcast Information Service, 5 January 1982
2. *The Tico Times*, 4 June 1982
3. Foreign Broadcast Information Service, 9 November 1982
4. *The Christian Science Monitor*, 25 May 1983
5. *The Philadelphia Inquirer*, 26 August 1983
6. *The New York Times*, 9 September 1983
7. Foreign Broadcast Information Service, 7 November 1983
8. *Newsweek*, 28 May 1984
9. *The New York Times*, 1 June 1984
10. *The Washington Post*, 1 June 1984
11. *The Washington Post*, 11 September 1984
12. *The New York Times*, 12 September 1984
13. *The Nation*, 3 November 1984
14. *Life*, February 1985
15. The Associated Press, 16 April 1985
16. *The Washington Times*, 19 June 1985
17. *The Washington Times*, 3 July 1985
18. *The New York Times*, 8 July 1985
19. NBC Morning News (Transcript), 17 July 1985
20. NBC Nightly News (Transcript), 25 July 1985
21. *The New York Times*, 25 July 1985
22. *The Tico Times*, 26 July 1985
23. *The Tico Times*, 26 July 1985

24. *The New York Times*, 8 August 1985
25. *The Philadelphia Inquirer*, 15 August 1985
26. *The Tico Times*, 16 August 1985
27. *The Philadelphia Inquirer*, 18 August 1985
28. *The Tico Times*, 30 August 1985
29. *The Philadelphia Inquirer*, 1 September 1985
30. *Common Cause*, September/October 1985
31. *The Tico Times*, 26 March 1986
32. *The Tico Times*, 25 April 1986
33. *The Boston Sunday Globe*, 11 May 1986
34. *The Los Angeles Times*, 17 May 1986
35. *The New York Times*, 30 May 1986
36. The Associated Press, 4 June 1986
37. *The Tico Times*, 6 June 1986
38. *The Tico Times*, 6 June 1986
39. *The Miami Herald*, 17 June 1986
40. West 57th Street (Transcript), CBS Television Network, 25 June 1986
41. *The Tico Times*, 27 June 1986
42. *The Miami Herald*, 29 June 1986
43. *The Boston Sunday Globe*, 20 July 1986
44. *The Washington Times*, 18 August 1986
45. *The New York Times*, 25 September 1986
46. *The Tico Times*, 26 September 1986
47. *The Miami Herald*, 27 September 1986
48. *The Dallas Morning News*, 29 September 1986
49. *The New York Times*, 29 September 1986
50. *The Miami Herald*, 8 October 1986
51. *The Washington Post*, 17 October 1986
52. *The New York Times*, 24 October 1986
53. *The Dallas Morning News*, 24 November 1986
54. *The Miami Herald*, 7 December 1986
55. *The New York Times*, 26 December 1986
56. *The Tico Times*, 16 January 1987
57. *The Sun* (Baltimore), 18 January 1987
58. *The Times* (London), 7 February 1987
59. *The Boston Sunday Globe*, 22 February 1987
60. *The Miami Herald*, 22 February 1987
61. *The Miami Herald*, 1 March 1987
62. Foreign Broadcast Information Service, 13 March 1987
63. *The New York Times*, 3 May 1987
64. *Newsday*, 17 May 1987
65. *The Wall Street Journal*, 21 May 1987
66. Reuters, 14 July 1987
67. *The Boston Globe*, 15 July 1987
68. *The Washington Post*, 23 July 1987.

Annex J. DOCUMENTS OF UNIDAD NICARAGUENSE OPOSITORA/UNITED NICARAGUAN OPPOSITION (UNO): MINUTES OF MEETINGS AND BUDGETARY DOCUMENTS

Attachment 1. Budgetary Documents of UNO/Costa Rica
Attachment 2. Letter from Evenor Valdivia, UNO Co-ordinator, to Sr. Carlos Abarca, 25 February 1986

Attachment 3. Minutes of Meeting of UNO Directors, 10 and 11 July 1985
Attachment 4. Minutes of Meeting of UNO Directors, 28 August 1985
Attachment 5. Minutes of Meeting of UNO Directors, 14-16 October 1985
Attachment 6. Minutes of Meeting of UNO Directors, 27 December 1985.

Annex K. REPORT OF WITNESS FOR PEACE ON "THE PEACE FLOTILLA ON THE RIO SAN JUAN", AUGUST 1985.

CORRESPONDENCE

CORRESPONDANCE

1. THE AGENT OF NICARAGUA TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

[See pp. 3-8, supra*]*

2. THE REGISTRAR TO THE AGENT OF NICARAGUA

28 July 1986.

I have the honour to acknowledge receipt of two Applications by the Republic of Nicaragua, one instituting proceedings against the Republic of Costa Rica and the other against the Republic of Honduras, both filed in the Registry today, 28 July 1986, at 10.00 a.m. local time.

The Government of Costa Rica and the Government of Honduras are informed by me by telex[1] of the filing of the Applications. In accordance with Article 38, paragraph 4, of the 1978 Rules of Court, a certified copy of the relevant Application will be immediately transmitted to the Governments concerned.

(Signed) Santiago TORRES BERNÁRDEZ.

3. LE GREFFIER AU MINISTRE DES RELATIONS EXTÉRIEURES ET DES CULTES DU COSTA RICA

28 juillet 1986.

Comme suite à mon télex[2] de ce jour, j'ai l'honneur de confirmer à Votre Excellence que le Gouvernement de la République du Nicaragua a déposé aujourd'hui, 28 juillet 1986, à 10 heures du matin, au Greffe de la Cour internationale de Justice, à La Haye, une requête introduisant une instance contre le Gouvernement de la République du Costa Rica.

Votre Excellence voudra bien trouver ci-joint, conformément aux articles 40, paragraphe 2, du Statut et 38, paragraphe 4, du Règlement de la Cour, copie certifiée conforme de ladite requête. Je lui ferai prochainement parvenir d'autres exemplaires de la requête en question, dans l'édition imprimée, établie par les soins du Greffe, qui en contiendra également la traduction en langue française.

Je saisis cette occasion pour attirer l'attention de Votre Excellence sur l'article 40 du Règlement de la Cour qui dispose, à son paragraphe 2, que dès la réception de la copie certifiée conforme de la requête ou le plus tôt possible après, le défendeur fait connaître à la Cour le nom de son agent. Le paragraphe 1 du même article dispose que les agents doivent avoir au siège de la Cour un domicile élu auquel sont adressées toutes les communications relatives à l'affaire.

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[1] Not reproduced.

[2] Non reproduit.

4. THE REGISTRAR TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

28 July 1986.

With reference to my telex message[1] transmitted to you today, I have the honour to communicate to you herewith a copy of the Application instituting proceedings against the Republic of Costa Rica filed by the Government of the Republic of Nicaragua in the Registry of the Court at 10 a.m. on 28 July 1986. The usual printed bilingual edition is in preparation, and copies will be supplied to you as soon as possible with a view to the notification contemplated by Article 40, paragraph 3, of the Statute of the Court.

5. THE MINISTER FOR EXTERNAL RELATIONS AND ECCLESIASTICAL MATTERS OF COSTA RICA TO THE REGISTRAR

12 August 1986.

I have the honour to acknowledge receipt of your letter dated 28 July 1986 as well as the certified copy of the Application presented by the Republic of Nicaragua before that Court instituting proceedings against the Republic of Costa Rica.

The Government of Costa Rica has taken due note of this Application and has started to take all the necessary steps to prepare its defense.

To comply with Article 40, paragraph 2, of the Rules of the Court, we are in the process of selecting our Agent. In the course of the month of August, we will be in a position to indicate to the Court the name of our Agent, as well as the address in The Hague to receive notifications and communications in regard to this affair.

In acknowledging receipt of the Application presented by the Republic of Nicaragua, I would like to inform the Court that the Government of Costa Rica reserves the right to present, in due course, a counter-claim against the Republic of Nicaragua, as authorized by Article 80 of the Rules of the Court.

(Signed) Rodrigo MADRIGAL NIETO.

6. THE REGISTRAR TO THE AGENT OF NICARAGUA

18 August 1986.

With reference to the Application instituting proceedings filed by the Republic of Nicaragua in the Registry of the Court on 28 July 1986, I have the honour to transmit to you herewith a copy of a letter in Spanish[1], to which an English text is annexed, from the Minister of External Relations of the Republic of Costa Rica. The letter is dated 12 August 1986.

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[1] Not reproduced.

7. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES D'AFGHANISTAN[1]

21 août 1986.

Le 28 juillet 1986 a été déposée au Greffe de la Cour internationale de Justice une requête par laquelle la République du Nicaragua a introduit contre la République du Costa Rica une instance en l'affaire des *Actions armées frontalières et transfrontalières (Nicaragua c. Costa Rica).*

J'ai l'honneur, à toutes fins utiles, de vous transmettre ci-joint un exemplaire de cette requête.

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8. THE DIRECTOR-GENERAL OF THE MINISTRY OF EXTERNAL RELATIONS AND ECCLESIASTICAL MATTERS OF COSTA RICA TO THE REGISTRAR

(telex)

1 September 1986.

No. 851-86-dgm. I have the honour to notify the Court that the Government of Costa Rica has appointed Mr. Edgar Ugalde as its Agent in accordance with Article 40, paragraph 2, of the Rules of Court as stated in the Minister's letters of 12 August. For notifications and communications we have selected the following addresses:

The Hague:

Paul Just de la Paisières
Consul of Costa Rica
Meloenstraat No. 122
The Hague, Netherlands

Cable: CONSULRICA

Telephone: 070-254857

Rotterdam:

Salomon Jean René de Monchy
Consul-General
Meent 106
P.O. Box 762-3000 at Rotterdam

Cable: CONGERICA

Telephone: 010-130320
010-120210

Mr. Ugalde shall notify the Court of any changes thereof should the case arise.

By airmail our Foreign Minister Mr. Rodrigo Madrigal Nieto formally notified you of the above in letter dated August 29.

(Signed) Alvar ANTILLON SALAZAR.

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[1] Une communication analogue a été adressée aux autres Etats Membres des Nations Unies et aux Etats non membres des Nations Unies admis à ester devant la Cour.

9. THE DEPUTY-REGISTRAR TO THE AGENT OF NICARAGUA

3 September 1986.

I have the honour to inform you that by a telex message received in the Registry yesterday, the Government of Costa Rica has informed the Court of the appointment of Mr. Edgar Ugalde as its Agent in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica).* The Agent's address for service at the seat of the Court is as follows:

c/o Mr. Paul Just de la Paisières
Consul of Costa Rica
Meloenstraat 122
The Hague

Telephone: 070-254857
Cable address: CONSULRICA

The Government of Costa Rica has also indicated as an alternative address, in case of need, that of the Consul-General of Costa Rica in the Netherlands, Mr. Salomon Jean René de Monchy, Meent 106, P.O. Box 762-3000, Rotterdam, telephone 010-130320 or 120210, and cable address: CONGERICA.

(Signed) Eduardo VALENCIA-OSPINA.

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10. LE GREFFIER ADJOINT AU MINISTRE DES AFFAIRES ÉTRANGÈRES DES PAYS-BAS

18 septembre 1986.

Me référant au paragraphe V des principes généraux de l'accord du 26 juin 1946 entre le Gouvernement des Pays-Bas et la Cour internationale de Justice, j'ai l'honneur de porter à votre connaissance qu'en l'affaire des *Actions armées frontalières et transfrontalières (Nicaragua c. Costa Rica)* le Gouvernement du Nicaragua a désigné comme agent S. Exc. M. Carlos Argüello Gómez, ambassadeur à La Haye. De son côté, le Gouvernement du Costa Rica a désigné comme agent S. Exc. M. Edgar Ugalde Alvarez, ambassadeur.

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11. THE DEPUTY-REGISTRAR TO THE AGENT OF NICARAGUA[1]

23 September 1986.

I have the honour to inform Your Excellency that the President of the Court, pursuant to Article 31 of the Rules of Court, wishes to receive the Agents of the Parties to the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* at 11 a.m. on Friday 17 October 1986, for the purpose of ascertaining their views with regard to questions of procedure in the case.

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[1] A communication in the same terms was sent to the Agent of Costa Rica.

12. THE REGISTRAR TO THE AGENT OF COSTA RICA[1]

22 October 1986.

I have the honour to inform you that by an Order[2] dated 21 October 1986, the Court has fixed the following time-limits for the written proceedings in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*.

For the Memorial of the Republic of Nicaragua: 21 July 1987.
For the Counter-Memorial of the Republic of Costa Rica: 21 April 1988.

The subsequent procedure including the date for the opening of oral proceedings is reserved for further decision. I enclose the official sealed copy of the Order.

13. LE GREFFIER AU MINISTRE DES RELATIONS EXTÉRIEURES DU BRÉSIL[3]

3 novembre 1986.

Par lettres du 21 août 1986, j'ai eu l'honneur de vous communiquer un exemplaire de chacune des deux requêtes introductives d'instance présentées à la Cour par la République du Nicaragua contre la République du Costa Rica et la République du Honduras, respectivement, dans les affaires des *Actions armées frontalières et transfrontalières (Nicaragua c. Costa Rica)* et *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras)*.

J'ai maintenant l'honneur de vous informer, premièrement, que, par ordonnance du 21 octobre 1986, la Cour a fixé comme suit les délais pour le dépôt des pièces de la procédure écrite dans l'affaire des *Actions armées frontalières et transfrontalières (Nicaragua c. Costa Rica)*:

Pour le mémoire de la République du Nicaragua: le 21 juillet 1987.
Pour le contre-mémoire de la République du Costa Rica: le 21 avril 1988.

Deuxièmement, par ordonnance du 22 octobre 1986, la Cour a fixé comme suit les délais pour le dépôt des pièces de la procédure écrite relatives aux questions de la compétence de la Cour et de la recevabilité de la requête dans l'affaire des *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras)*:

Pour le mémoire de la République du Honduras: le 23 février 1987.
Pour le contre-mémoire de la République du Nicaragua: le 22 juin 1987.

Dans les deux cas, la Cour a réservé la suite de la procédure (c'est-à-dire en particulier le déroulement de la procédure orale).

Le texte imprimé des ordonnances vous sera communiqué sous peu.

Enfin, j'ai reçu pour instructions, conformément à l'article 43 du Règlement de la Cour, d'appeler votre attention sur le fait que, dans les deux requêtes, la République du Nicaragua invoque notamment le traité américain de règlement pacifique (pacte de Bogotá) conclu à la neuvième conférence internationale des Etats américains en 1948. Il me faut ajouter cependant que la présente notification ne préjuge aucune décision que la Cour pourrait être appelée à prendre en application de l'article 63 du Statut.

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[1] A communication in the same terms was sent to the Agent of Nicaragua.

[2] *I.C.J. Reports 1986*, p. 548.

[3] La même communication a été adressée aux Etats suivants: Chili, Colombie, Haïti, Mexique, Pérou, République dominicaine et Uruguay.

14. THE REGISTRAR TO THE AGENT OF NICARAGUA[1]

11 November 1986.

I have the honour to inform Your Excellency that, pursuant to Article 43 of the Rules of Court, I was recently instructed by the Court to draw to the notice of the parties to the American Treaty on Pacific Settlement (Pact of Bogotá) concluded at the Ninth International Conference of American States in 1948, the fact that the Republic of Nicaragua invokes, *inter alia*, that treaty in its Application instituting proceedings in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica).*

The relevant notifications were carried out by letters dated 3 November 1986.

15. THE AGENT OF COSTA RICA TO THE REGISTRAR

12 November 1986.

I have the honor to inform you, in reference to the Press Release[2] number 86/13 and in accordance to the terms of the meeting held at The Hague last October 17 to fix the time-limits for the written proceedings, that the Government of Costa Rica confirms that it fully accepts the jurisdiction of the Court and consequently does not intend to challenge said jurisdiction in this case.

However, this does not preclude the possibility that preliminary objections against the Application submitted by Nicaragua on 28 July 1986, other than those opposing the Court's jurisdiction, might eventually be raised by the Government of Costa Rica at the appropriate time and in conformity with Article 79 of the Rules.

(Signed) Edgar UGALDE ALVAREZ.

16. LE GREFFIER AU SECRÉTAIRE AUX RELATIONS EXTÉRIEURES DU HONDURAS

20 novembre 1986.

J'ai l'honneur de me référer à la lettre du 21 août 1986 par laquelle je vous ai communiqué un exemplaire de la requête introductive d'instance présentée à la Cour par la République du Nicaragua contre la République du Costa Rica en l'affaire concernant des *Actions armées frontalières et transfrontalières (Nicaragua c. Costa Rica)*, ainsi qu'à l'ordonnance en date du 21 octobre 1986 par laquelle la Cour, tout en réservant la suite de la procédure, a fixé comme suit les dates d'expiration des délais pour le dépôt des pièces écrites en cette affaire: pour le mémoire du Nicaragua, le 21 juillet 1987; pour le contre-mémoire du Costa Rica, le 21 avril 1988. Vous trouverez ci-joint un exemplaire de cette ordonnance.

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[1] A communication in the same terms was sent to the Agent of Costa Rica.

[2] Not reproduced.

J'ai reçu pour instructions, conformément à l'article 43 du Règlement de la Cour, d'appeler votre attention sur le fait que, dans sa requête, la République du Nicaragua invoque notamment le traité américain de règlement pacifique (pacte de Bogotá) conclu à la neuvième conférence internationale des Etats américains en 1948. Il me faut ajouter cependant que la présente notification ne préjuge aucune décision que la Cour pourrait être appelée à prendre en application de l'article 63 de son Statut.

17. THE REGISTRAR TO THE AGENT OF COSTA RICA

21 November 1986.

I have the honour to acknowledge receipt of Your Excellency's letter of 12 November 1986 recalling the possibility of your Government's raising preliminary objections, at the appropriate time and in conformity with Article 79 of the Rules of Court, in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*.

I am transmitting a copy of your letter to the Agent of Nicaragua in the aforesaid case.

18. THE MINISTER *a.i.* FOR EXTERNAL RELATIONS AND ECCLESIASTICAL MATTERS OF COSTA RICA TO THE REGISTRAR

(telex)

2 December 1986.

I have the honour to inform the Court that our Government has decided to appoint Dr. Raúl Trejos Flores, as Co-Agent of the Republic of Costa Rica in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* (1986, General List No. 73).

Please accept, Sir, the assurances of my highest consideration.

(Signed) Carlos Rivera Bianchini.

19. THE REGISTRAR TO THE AGENT OF NICARAGUA

3 December 1986.

I have the honour to inform you that by a telex message received today in the Registry, the Government of Costa Rica has informed the Court of the appointment of Dr. Raúl Trejos Flores as its Co-Agent in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica).*

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20. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES DES PAYS-BAS

11 décembre 1986.

Me référant au paragraphe V des principes généraux de l'accord du 26 juin 1946 entre le Gouvernement des Pays-Bas et la Cour internationale de Justice, j'ai l'honneur de porter à votre connaissance qu'en l'affaire des *Actions frontalières et transfrontalières (Nicaragua c. Costa Rica)* le Gouvernement du Costa Rica a désigné M. Raúl Trejos Flores comme coagent.

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21. THE REGISTRAR TO THE MINISTER FOR FOREIGN AFFAIRS OF THE NETHERLANDS

12 June 1987.

With reference to my predecessor's letter 77044 of 11 December 1986, I have the honour to advise Your Excellency that, as I have been informed, the Co-Agent of Costa Rica in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica),* Mr. Raúl Trejos Flores, and Mrs. Nair Baptiste Pereira Trejos, are at present in The Hague and have taken up residence at Offenberglaan 1, Flat 25A, Marlot, The Hague (tel. 853253).

I am confident that, in connection with the residence of Mr. Trejos and his wife, Your Excellency will be extending to them every privilege, immunity and facility consonant with paragraph 5 of the general principles set out in the appendix to the exchange of letters between your predecessor and the then President of the Court on 26 June 1946.

(Signed) Eduardo VALENCIA-OSPINA.

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22. THE AGENT OF COSTA RICA TO THE REGISTRAR

22 June 1987.

I have the honour to inform the Court that my Government has established provisional offices in The Hague and has a new address in this city for service, where all communications concerning our pending case before that Court should be delivered.

The new address is:

Lange Voorhout 58,
2514 EG 's-Gravenhage.

Telephone: 46 96 60.
Telex No.: 32561 (Hague Nl).

23. THE AGENT OF NICARAGUA TO THE REGISTRAR

(telex)

16 July 1987.

Confirming our telephone conversation earlier today, for technical reasons I have requested that the Court grant Nicaragua an extension of time until 10 August 1987 for the filing of its Memorial on the merits in the case of *Nicaragua* v. *Costa Rica*. Naturally I would consent to a similar extension of time for the submission of Costa Rica's Memorial.

(Signed) Carlos ARGÜELLO GÓMEZ.

24. THE PRINCIPAL LEGAL SECRETARY OF THE COURT TO THE AGENT OF COSTA RICA

17 July 1987.

I have the honour to transmit to Your Excellency herewith a copy of a telex message received this morning from the Agent of Nicaragua in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*, requesting an extension to 10 August 1987 of the time-limit for the filing of the Memorial of Nicaragua.

In accordance with Article 44, paragraph 3, of the Rules of Court, I shall be obliged if Your Excellency would furnish the Court as soon as possible with the views of the Government of Costa Rica on this request.

(Signed) H. W. A. THIRLWAY.

25. THE AGENT OF COSTA RICA TO THE REGISTRAR

21 July 1987.

I have the honour to acknowledge receipt of the letter No. 78252 of 17 July transmitting copy of a telex message received in the Court by the Agent of Nicaragua requesting an extension to 10 August 1987 of the time-limit for the filing of his country's Memorial in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* and requesting the views of the Government of Costa Rica on that request.

The Government of Costa Rica wishes to state its surprise for this attitude of the Government of Nicaragua which differs entirely with the views that said Government expressed and strongly defended in the meeting held on 17 October 1986 convened by the President of the Court in accordance with Article 31 of the Rules of the Court.

In that meeting of 17 October 1986, the Government of Nicaragua opposed the position of Costa Rica when requested long terms for the filing of pleadings, in particular its Counter-Memorial. This contrast of positions of the Government of Nicaragua is a motive of concern for the Government of Costa Rica because it gives grounds to consider that the case now before the International Court of Justice is being utilized by the Government of Nicaragua for political purposes, in view of the forthcoming meeting of the Presidents of Central America that will be held in Guatemala on 6-7 August 1987. And in consideration of the high esteem and respect that our Government has for the International Court of Justice, Costa Rica strongly opposes any attempt on the part of Nicaragua to make use of the case before that High International Tribunal for political purposes.

The Government of Costa Rica suspects that the request for an extension of the time-limit for filing the Memorial as presented by the Honourable Agent of Nicaragua could constitute a manoeuvre that could be utilized as political pressure in the Meeting of Presidents of Central America, with the intent of deleting the democratization aspects contained in the Plan of Peace of the President of Costa Rica, to which aspect Nicaragua is opposed.

In spite of the above considerations, the Government of Costa Rica is not opposed to the extension of the time-limit for the filings of the Memorial that has requested the Honourable Agent of the Republic of Nicaragua.

26. THE REGISTRAR TO THE AGENT OF NICARAGUA

21 July 1987.

I have the honour to refer to Your Excellency's telex message received on 17 July 1987, requesting an extension of the time-limit for the filing of the Memorial of the Republic of Nicaragua in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*, and to send you herewith a copy of a letter dated 21 July 1987, and received in the Registry today, from the Agent of Costa Rica, setting out the views of his Government on that request.

After considering the request and the views of the Government of Costa Rica, the Vice-President of the Court, Acting President, has decided to extend the time-limit for the filing of the Memorial of Nicaragua to 10 August 1987 and the time-limit for the filing of the Counter-Memorial of Costa Rica to 2 June 1988. The appropriate Order[1] to that effect will be transmitted to you shortly.

27. THE REGISTRAR TO THE AGENT OF COSTA RICA

21 July 1987.

I have the honour to acknowledge receipt of Your Excellency's letter of 21 July 1987, setting out the views of the Government of Costa Rica on the request made by the Government of Nicaragua for an extension of the time-limit for the filing of the Memorial of Nicaragua in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*.

After considering the request and the views of the Government of Costa Rica, the Vice-President of the Court, Acting President, has decided to extend the time-limit for the filing of the Memorial of Nicaragua to 10 August 1987 and the time-limit for the filing of the Counter-Memorial of Costa Rica to 2 June 1988. The appropriate Order to that effect will be transmitted to you shortly.

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[1] *I.C.J. Reports 1987*, p. 179.

28. THE REGISTRAR TO THE SECRETARY GENERAL OF THE ORGANIZATION OF AMERICAN STATES

21 July 1987.

I have the honour to inform you that in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)*, brought before the Court by Nicaragua, one of the bases of jurisdiction for the Court relied on by Nicaragua is Article XXXI of the American Treaty on Pacific Settlement (Pact of Bogotá) concluded at the Ninth International Conference of American States in 1948. Honduras has however contended, *inter alia*, that Article XXXI of that Treaty cannot be invoked as a basis of jurisdiction independently of Article XXXII, and that the latter Article precludes any unilateral application to the Court except on certain conditions which, in the view of Honduras, are not satisfied in this case. The proceedings therefore appear to raise questions of construction of the Pact of Bogotá.

The Court has directed that the initial pleadings in the case be directed to questions of jurisdiction and admissibility, and those pleadings have now been filed; on 20 October 1987 oral proceedings will open, with a view to a judgment being given by the Court on those questions.

Article 34, paragraph 3, of the Statute of the Court provides as follows:

> "3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings."

The Pact of Bogotá appears to fall in the category of conventions contemplated by this Article, since it provides in its preamble as follows:

> "In the name of their peoples, the Governments represented at the Ninth International Conference of American States have resolved, *in fulfillment of Article XXIII of the Charter of the Organization of American States*, to conclude the following Treaty: . . ." (Emphasis added.)

In these circumstances the Court has instructed me to communicate to the Organization of American States copies of all the written proceedings. I accordingly have the honour to enclose herewith copies of the Application instituting proceedings, the Memorial submitted by the Government of Honduras, and the Counter-Memorial submitted by the Government of Nicaragua, together with the annexes to those pleadings.

This instruction was given pursuant to Article 69, paragraph 3, of the Rules of Court, which is in the following terms:

> "3. In the circumstances contemplated by Article 34, paragraph 3, of the Statute, the Registrar, on the instructions of the Court, or of the President

> if the Court is not sitting, shall proceed as prescribed in that paragraph. The Court, or the President if the Court is not sitting, may, as from the date on which the Registrar has communicated copies of the written proceedings and after consulting the chief administrative officer of the public international organization concerned, fix a time-limit within which the organization may submit to the Court its observations in writing. These observations shall be communicated to the parties and may be discussed by them and by the representative of the said organization during the oral proceedings."

The Vice-President of the Court, Acting President, has directed me further to ask you to inform me as soon as possible whether the Organization of American States would wish to submit to the Court observations on the matter in accordance with Article 69, paragraph 3, of the Rules of Court, and to inform you that he has fixed 20 September 1987 as the time-limit within which such observations may be filed.

Furthermore, I should inform you that Nicaragua has also instituted proceedings against the Republic of Costa Rica *(Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica))*, and one of the bases of jurisdiction relied on in these proceedings also is Article XXXI of the Pact of Bogotá. However, the Government of Costa Rica has not yet indicated whether or not it contests the claim of Nicaragua to the existence of jurisdiction on that basis, and it therefore appears premature to say whether a question of construction of Article XXXI will arise in that case as well. I enclose for your information a copy of the Application in that case and of the Orders made by the Court on both cases.

Finally, for the sake of completeness, I should also draw your attention to the fact that in its Applications in these two cases Nicaragua asserts that Honduras and Costa Rica have committed breaches of the Charter of the OAS and of the Pact of Bogotá. These allegations may also raise questions of construction of those two instruments, but, in the proceedings brought against Honduras at least, the Court will only be called upon to examine such allegations if it is satisfied that it has jurisdiction, a point which, as indicated, forms the subject of the initial stage of those proceedings.

29. THE REGISTRAR TO THE AGENT OF NICARAGUA

21 July 1987.

I have the honour to transmit to Your Excellency herewith a copy of a letter I have today sent to the Secretary General of the Organization of American States, referring to the cases concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* and *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*.

30. THE REGISTRAR TO THE AGENT OF COSTA RICA

21 July 1987.

I have the honour to transmit to Your Excellency herewith a copy of a letter I have today sent to the Secretary General of the Organization of American States. This letter relates primarily to the case concerning *Border and Trans-*

border Armed Actions (Nicaragua v. *Honduras)*, but as you will observe, reference is also made to the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*.

31. THE SECRETARY GENERAL OF THE ORGANIZATION OF AMERICAN STATES TO THE REGISTRAR

29 July 1987.

I am pleased to acknowledge receipt of your note 78281, dated July 21, 1987, enclosing a copy of all the written proceedings on the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* brought before the International Court of Justice by Nicaragua.

As to whether or not the Organization of American States wishes to submit to the Court observations on the matter, I am of the opinion that, in this case, the Secretary General would not have the authority to make such observations.

Furthermore, the convening of the Permanent Council of the Organization on this matter would require that each Member State be provided with copies of all the written proceedings on the case which may contravene the Rules of the Court.

On the other hand, it is my understanding that the Court has already notified all the other parties to the American Treaty on Pacific Settlement (Pact of Bogotá) on the fact that these proceedings appear to raise questions of the construction of this Pact.

(Signed) João Clemente BAENA SOARES.

32. THE REGISTRAR TO THE AGENT OF NICARAGUA

3 August 1987.

I have the honour to transmit to Your Excellency herewith a copy of a letter dated 29 July 1987 and handed to me today by the Legal Adviser of the Organization of American States containing the reply of the Secretary General of the OAS to my letter of 21 July 1987 referring to the cases concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* and *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*.

33. THE REGISTRAR TO THE AGENT OF COSTA RICA

3 August 1987.

I have the honour to transmit to Your Excellency herewith a copy of a letter dated 29 July 1987 and handed to me today by the Legal Adviser of the Organization of American States containing the reply of the Secretary General of the OAS to my letter of 21 July 1987 referring to the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*.

34. THE AGENT OF NICARAGUA TO THE REGISTRAR

10 August 1987.

I have the honour to refer to the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica).*

By Order of the Vice-President of the Court, Acting President, the time-limit for the filing of Nicaragua's Memorial was extended until this August 10, 1987. In compliance with this Order, I proceed to file Nicaragua's Memorial.

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35. THE AGENT OF NICARAGUA TO THE REGISTRAR

10 August 1987.

I have the honour to refer to the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica).*

The Court requested the views of the Government of Costa Rica on the petition made by the Government of Nicaragua that the time-limit for the filing of its Memorial be extended until August 10, 1987.

The Government of Costa Rica by means of a letter dated July 21, 1987 set out its views on the request made by the Government of Nicaragua.

The letter indicates that Nicaragua's request

> "gives ground to *consider* that the case now before the International Court of Justice is being utilized by the Government of Nicaragua for political purposes . . .",

and further adds that

> "The Government of Costa Rica *suspects* that the request for an extension . . . could constitute a manoeuvre that could be utilized as political pressure in the (forthcoming) Meeting of Presidents of Central America, with the intent of deleting the democratization aspects contained in the Plan of Peace of the President of Costa Rica, to which Nicaragua is opposed."

The Government of Nicaragua denies any merit to the considerations and suspicions set out by Costa Rica in the letter in reference.

Furthermore, Nicaragua wishes to point out that the Costa Rican authorities themselves had manifested their pre-occupation with the fact that the filing of the Memorial of Nicaragua just a few days before the meeting of Presidents could damage the atmosphere of fraternity and mutual trust that should characterize that meeting in order to achieve agreements that would foster peace in Central America.

For this reason, the Minister of Foreign Affairs of Nicaragua personally explained to the Costa Rican authorities that the extension of the time-limit for the presentation of Nicaragua's Memorial, would also have the effect of eliminating the worries voiced by Costa Rica.

In any case, the fact that Nicaragua is filing its Memorial today in fulfillment of its obligations, is adequate proof of Nicaragua's respect for the International Court of Justice and the serenity with which it performs its international responsibilities.

Finally, Costa Rica's "suspicions" are not legal concepts that can be adequately addressed in the present instance. It might be added that even in the instance of political negotiations the voicing of "suspicions" prior to discussions is not precisely conducive to an adequate atmosphere for reaching agreements.

In this instance — and much less in this letter — we cannot begin to address Nicaragua's position on the Peace Plan of the President of Costa Rica. All we can say is that Nicaragua demands what Latin America has demanded for decades and what has given rise to the main contributions of Latin America to international law: respect for its sovereignty and non-intervention in its internal affairs.

Lastly, since this letter is written after the meeting of the Central American Presidents we can say — certainly with hindsight but nonetheless truthfully — that the will of Nicaragua is to reach peace in Central America.

36. THE REGISTRAR TO THE AGENT OF NICARAGUA

10 August 1987.

I have the honour to acknowledge the filing today of the Memorial of Your Excellency's Government in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* together with a certified copy, which has been transmitted to the Agent of Costa Rica, four volumes of Annexes, one set of which has likewise been transmitted to that Agent, and a number of plain copies of both the Memorial and its Annexes.

I also acknowledge the receipt of two letters bearing today's date, one of which constituted a letter of transmittal in regard to the Memorial. A copy of each of these letters has been conveyed to the Agent of Costa Rica.

Note has been taken that translation work is proceeding with a view to full compliance with Article 51 (3) of the Rules of Court. It will be appreciated if the requisite translations into an official language of the Court are supplied as soon as possible together with the appropriate certification of their accuracy.

37. THE REGISTRAR TO THE AGENT OF COSTA RICA

10 August 1987.

I have the honour to transmit to Your Excellency herewith a certified copy of the Memorial filed today in the Registry by the Agent of Nicaragua in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*, of the four volumes of annexes furnished therewith and of the accompanying letter of transmittal.

The attention of the Agent of Nicaragua has been drawn to the fact that translations of certain documents of which only the Spanish text has been supplied will have to be provided in accordance with Article 51 (3) of the Rules of Court. It is understood that the work of translation has been put in train.

Further copies of the Memorial and Annexes will be supplied very shortly for your use.

38. THE REGISTRAR TO THE AGENT OF COSTA RICA

10 August 1987.

I have the honour to transmit herewith to Your Excellency a copy of a letter of today's date in which the Agent of Nicaragua in the case concerning the *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* presents the observations of his Government on the views set out by the Government of Costa Rica on 21 July 1987.

This letter was handed to me by the Agent of Nicaragua concurrently with the filing of his Government's Memorial in the case.

39. THE AGENT OF NICARAGUA TO THE REGISTRAR

11 August 1987.

I have the honour to refer to the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica).*

The Minister of Foreign Affairs of Nicaragua, Father Miguel D'Escoto Brockmann, has given me instructions as Agent of Nicaragua in the case in reference, to file before the Court the letter of this same date addressed to the President of the Court which I enclose herewith.

This letter was written in Spanish[1] and a translation into English[2] is also accompanied. The document mentioned in the letter, that is the agreement[1] signed by the five Central American Presidents in Guatemala, is accompanied in its original Spanish language and a translation will be prepared and sent to the Court as soon as possible. In all events, this document is well known by the other party and the lack of an immediate translation will presumably not cause any unnecessary delays for them.

Annex

Managua, August 11, 1987.

Mr. President:

In an effort to reach the pacific solution of the situation of aggression that Nicaragua is undergoing, and aware that "peace is the respect of the right of others", the Government of Nicaragua came before the International Court of Justice, the highest tribunal in the world, in order to denounce that the most sacred principles and rules of international law that govern the relations among sovereign states, were being systematically and dangerously violated by Costa Rica, through this country's active participation in the military and paramilitary activities of the United States against Nicaragua, which had been condemned by the International Court of Justice in its historic decision of June 27, 1986.

Nevertheless, parallel to the efforts that Nicaragua had been making in the substantiation of its application against Costa Rica, and also previously to the introduction of the application, Nicaragua continued to seek through legal means, a situation of respect for international law, that would guarantee the legitimate national interests of Nicaragua and would remove the threat of war in the Central American region.

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[1] Not reproduced.

[2] See Annex to this communication.

These efforts have resulted in a regional agreement, signed in the city of Guatemala last August 7, under the title of "procedures for bringing about a stable peace in Central America", a copy of which we attach herewith.

This agreement, in its section 5, "termination of aid to irregular forces or insurrectional movements", and in its section 6, "non use of the territory for the aggression of other states", establishes serious obligations, freely signed and undertaken by the five presidents of the Central American area, among them the President of Costa Rica, Oscar Arias Sánchez. Through, the enforcement of these obligations, Costa Rica would strictly and faithfully comply with the international commitments that they have been violating in their relations with Nicaragua and that constituted the object of the application introduced by Nicaragua before this high tribunal.

Section 5 of the regional agreement literally states, among other obligations, the following:

> "The governments of the five Central American States will request the governments of the region and the governments outside the region that, openly or covertly give military, logistical, financial or propaganda assistance or aid in men, armaments, munitions or equipment to irregular forces or insurrectional movements, that this aid be stopped, as an indispensable element in order to obtain a stable and lasting peace in the region."

It is obvious that this commitment of the Central American Governments implies that, in the first place, it must be the Central American Governments themselves that must put an end to any type of aid and support that they give to the irregular forces and insurrectional movements.

On the other hand, section 6 commits all the Governments of the region that have signed the agreement to

> "stopping the use of their own territory and not to give or permit to be given any military logistical support to persons, organizations or groups that attempt to destabilize the governments of the countries of Central America".

The strict and faithful compliance of these commitments would satisfy the main objective sought by Nicaragua when it introduced its application against Costa Rica on July 28, 1986. That objective, as has insistently been pointed out by Nicaragua, was and continues to be peace, by means of restoring respect for international law. Guaranteeing peace between Costa Rica and Nicaragua, by means of law and justice, has been the reason behind Nicaragua's application.

The Government of Nicaragua considers that the regional agreement signed by the presidents of Central America in the meeting known as "Esquipulas II", constitutes a transcendental and historical occurrence because of the obligation accepted of "wholly assuming the historical challenge of forging a destiny of peace for Central America".

In order to obtain the execution of that regional agreement, it was imperative that there was the political will, a great faith and the disposition of certain Governments to trust other Governments. This last element, the trust in the good faith compliance of the obligations assumed, was particularly necessary in the case of Nicaragua, a nation faced with a cruel and inhuman war of aggression, that has been made possible by the active participation of neighbouring countries, that have been giving all type of facilities and support and have involucrated themselves in the war of aggression against Nicaragua, as is evidenced in the Memorial filed this August 10 in the case against Costa Rica.

Within the spirit and will of continuing to foster in all things possible the cause of peace in Central America, Nicaragua wishes to abstain from any action, no matter how legitimate, that could clog the atmosphere of mutual trust useful to the full compliance of all the obligations undertaken in the presidential agreement of "Esquipulas II", in particular those referring to not permitting the use of the territory for activities of any type aimed at the destabilization or overthrow of the Governments of the region. With this objective, Nicaragua wishes the suspension of the proceedings in the case submitted against Costa Rica in the International Court of Justice, if and only said country does not oppose this suspension.

Acting with reponsibility and good faith, Nicaragua trusts that the compliance of Costa Rica with the commitments undertaken by the Presidents of Central America in Guatemala, will satisfy the just demands it made in its application against Costa Rica. Full compliance with these commitments would fully satisfy Nicaragua and adequately fulfill the aims sought in its judicial recourse. In spite of the grave international responsibilities incurred by Costa Rica by its illicit conduct, it has not been the main objective of Nicaragua to obtain the condemnation of this country, but to put a stop to the war of aggression that the people of Nicaragua are suffering.

The Government of Nicaragua recognizes in the International Court of Justice a fundamental proceeding for peace amongst peoples and nations. Recourse to this high tribunal has meant a clear and invaluable support to the cause of peace in Central America and the strengthening of the international juridical order. Nicaragua will continue putting its faith in the Court as the proceeding par excellence for the pacific solution of controversies. Nicaragua also trusts that Costa Rica will accept to bring before this Court, the controversies which in the future may occur in its relations with Nicaragua. The Government of Nicaragua for its part, maintains its firm disposition of continuing to have recourse to these means of pacific solution in all those situations that merit it.

I avail myself of this occasion, Mr. President, to renew the assurances of my highest consideration.

Miguel D'ESCOTO BROCKMANN,
Minister of Foreign Affairs.

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40. THE REGISTRAR TO THE AGENT OF NICARAGUA

11 August 1987.

I have the honour to acknowledge receipt of Your Excellency's letter of today addressed to me, together with a copy of a communication dated also 11 August 1987, drafted in Spanish and translated into English, addressed to the President of the International Court of Justice by the Minister for Foreign Affairs of Nicaragua as well as a copy, in the original Spanish, of the Agreement signed at Guatemala City on 7 August 1987 by the Presidents of five Central American States.

The documents mentioned above have been brought to the attention of the President of the Court and copies thereof have been transmitted immediately to the Agent of Costa Rica in the case concerning ***Border and Transborder Armed Actions (Nicaragua*** v. ***Costa Rica)*** under cover of a letter copy of which I am also enclosing herewith.

41. THE REGISTRAR TO THE AGENT OF COSTA RICA

11 August 1987.

I have the honour to transmit to Your Excellency herewith a copy of a letter handed to me today by the Agent of Nicaragua in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica).* This letter was accompanied by a copy of a communication dated also 11 August 1987, drafted in Spanish and translated into English, addressed to the President of the Court by the Minister for Foreign Affairs of Nicaragua, together with a copy in the original Spanish of the Agreement signed at Guatemala City on 7 August 1987 by the Presidents of five Central American States. I am also transmitting herewith copies of the above-mentioned documents.

May I draw Your Excellency's attention to the passage in the letter of the Foreign Minister of Nicaragua whereby he indicates that his country "wishes the suspension of the proceedings in the case submitted against Costa Rica in the International Court of Justice, if and only said country does not oppose this suspension".

42. THE AGENT OF NICARAGUA TO THE REGISTRAR

12 August 1987.

I have the honour to refer to the case concerning "*Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*".

With the purpose of giving Costa Rica an opportunity to comply fully and faithfully with the Agreements of Esquipulas II, in the atmosphere of fraternity that should distinguish this regional peace process, Nicaragua discontinues the judicial procedures instituted against Costa Rica in the International Court of Justice on July 28, 1986.

Accordingly, the Government of Nicaragua respectfully requests the Court to take the necessary steps to implement this request.

43. THE REGISTRAR TO THE AGENT OF NICARAGUA

12 August 1987.

I have the honour to acknowledge receipt of your communication dated 12 August 1987, giving notice of discontinuance of the proceedings instituted on 28 July 1986 by the Republic of Nicaragua against the Republic of Costa Rica and "requesting the Court to take the necessary steps to implement its request".

I also have the honour to inform you that I have today transmitted a certified copy of your above-mentioned communication to the Agent of the other Party by means of a letter, of which a copy is enclosed herewith, indicating that the

President of the Court, pursuant to Article 89, paragraph 3, of the Rules of Court, has fixed on Tuesday 18 August 1987 at 6 p.m. the time-limit within which the respondent may state whether it opposes the discontinuance of the proceedings, as prescribed in paragraph 2 of that Article.

44. THE REGISTRAR TO THE AGENT OF COSTA RICA

12 August 1987.

With reference to the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*, and further to my letter of 11 August 1987, I have the honour to transmit herewith a certified copy of a communication of today's date from the Agent of the Republic of Nicaragua, giving notice of discontinuance of the proceedings instituted on 28 July 1986 by the Republic of Nicaragua against the Republic of Costa Rica, and "requesting the Court to take the necessary steps to implement this request".

I also have the honour to inform you that the President of the Court, pursuant to Article 89, paragraph 3, of the Rules of Court, has fixed on Tuesday 18 August 1987 at 6 p.m. the time-limit within which the respondent may state whether it opposes the discontinuance of the proceedings, as prescribed in paragraph 2 of that Article.

A copy of this letter is being despatched to the Agent of the Republic of Nicaragua.

45. L'AMBASSADEUR DU HONDURAS AUX PAYS-BAS AU GREFFIER

13 août 1987.

J'ai l'honneur de porter à votre connaissance le désir du Gouvernement du Honduras de recevoir les pièces de procédure écrite dans l'affaire des *Actions armées frontalières et transfrontalières (Nicaragua c. Costa Rica)*.

En conformité avec l'article 53, paragraphe 1, du Règlement, je vous prie d'avoir l'obligeance de saisir la Cour de cette demande.

(Signé) Mario CARÍAS.

46. THE REGISTRAR TO THE AGENT OF NICARAGUA[1]

14 August 1987.

I have the honour to transmit to Your Excellency herewith a copy of a letter, dated 13 August 1987 and received in the Registry today, by which the Government of Honduras requests, pursuant to Article 53, paragraph 1, of the Rules of Court, that copies of the pleadings in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* be made available to it. In accordance with that provision, I shall be obliged if Your Excellency will inform me of the views of the Government of Costa Rica in this respect.

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[1] A communication in the same terms was sent to the Agent of Costa Rica.

47. THE AGENT OF COSTA RICA TO THE REGISTRAR

18 August 1987.

I have the honour of referring to the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica).*

1. On 12 August 1987, the Government of Nicaragua expressed to the International Court of Justice its unilateral and voluntary decision to discontinue the unfounded action brought by it against Costa Rica on 28 July 1986 and formalized on 10 August 1987, despite the fact it had announced it would not proceed with the case. In its petition, the Government of Nicaragua requested that the Court take the necessary steps to implement the discontinuance.

2. By an order dated also on 12 August 1987, the President of the Court, making use of the powers conferred on him in Article 89 (3) of the Rules, granted Costa Rica a time-limit, ending on 18 August 1987 at 18:00 hours, within which to state whether it opposes the discontinuance of the proceedings.

3. Within the time-limit fixed for this purpose, the Government of Costa Rica states that it does not oppose the discontinuance of the unjust action brought before the Court by the Government of Nicaragua.

4. However, said Government alleges that it has decided to discontinue the proceedings against my Government:

> "With the purpose of giving Costa Rica an opportunity to comply fully and faithfully with the Agreements of Esquipulas II, in the atmosphere of fraternity that should distinguish this regional peace process . . ."

5. Although the Government of Costa Rica agrees to the discontinuance of the inadmissible action brought by Nicaragua, it cannot tolerate, under any circumstances, that the arguments set forth by the applicant Government for putting an end to a proceeding which never should have begun, be left without an adequate answer. In any case, Nicaragua would have lost its case, because its action is based on allegations which are supported neither by facts nor by law.

6. The Government of Nicaragua has shown an inadmissible cynicism in trying to make it appear that it has to discontinue its unfortunate action in order for the Government of Costa Rica to comply, faithfully and fully, with the obligations it assumed on signing the Agreement of Esquipulas II. As anyone of good faith knows, this Agreement is a direct result of the Peace Plan presented to his Central American colleagues by President Oscar Arias of Costa Rica. Said Plan represents a standard of conduct which Costa Rica has observed for many decades. To obtain the acceptance of this Plan, the Costa Rican Government had to make a persistent effort over a period of more than six months.

7. Costa Rica is compelled to reject categorically the aggressive and unfounded terms used by the Nicaraguan Foreign Minister, Mr. Miguel D'Escoto, in his letter does not contribute to the harmony we seek in Central America.

8. In stating that it does not oppose the discontinuance requested by Nicaragua, Costa Rica wishes to express its hope that the Nicaraguan Government will fulfil the commitments it undertook in the document entitled "Process Toward Establishing a Firm and Lasting Peace in Central America", based on the Peace Plan proposed by the President of Costa Rica and signed on 7 August 1987, by the Presidents of the five Republics of Central America.

9. In light of the above, the Government of Costa Rica requests that in accordance with the provisions of Article 89 (3) and with reference to Article 89 (2) of

the Rules, the President of the Court make an order officially recording the discontinuance of the proceedings brought by Nicaragua against Costa Rica and directing the removal of the case from the list.

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48. THE AGENT OF COSTA RICA TO THE REGISTRAR

18 August 1987.

In reply to your letter No. 78361 dated 14 August 1987, I have the honour to inform the Court that the Government of Costa Rica has no objections that copies of the pleading in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* be made available to the Government of the Republic of Honduras as it has requested in its letter of 13 August 1987, pursuant to Article 5, paragraph 1, of the Rules of the Court.

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49. THE REGISTRAR TO THE AGENT OF NICARAGUA

18 August 1987.

I have the honour to transmit to Your Excellency herewith copies of two letters bearing today's date and handed to me this afternoon by the Agent of Costa Rica in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*, the one relating to the notice of discontinuance filed by Nicaragua on 12 August 1987 and the other to the request by the Government of Honduras that the pleadings in the case might be made available to it.

In view of the absence of objection by Costa Rica to the discontinuance of the case, the President of the Court will shortly make the appropriate Order pursuant to Article 89, paragraphs 2 and 3, of the Rules of Court.

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50. THE REGISTRAR TO THE AGENT OF COSTA RICA

19 August 1987.

I have the honour to acknowledge receipt of the letter which Your Excellency handed to me yesterday afternoon, informing me *(inter alia)* that the Government of Costa Rica does not object to the discontinuance by Nicaragua of the proceedings in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*. I now have the honour to transmit to you herewith two plain copies of an Order[1] made by the President of the Court today, placing that discontinuance on record, and directing the removal of the case from the list.

The official sealed copy of the Order destined for the Government of Costa Rica will be transmitted to you shortly.

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[1] *I.C.J. Reports 1987*, p. 182.

51. THE REGISTRAR TO THE AGENT OF NICARAGUA

19 August 1987.

Further to my letter of yesterday's date, I have the honour to transmit to Your Excellency herewith two plain copies of an Order made by the President of the Court today, placing on record the discontinuance of the proceedings in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*, and directing the removal of that case from the list.

The official sealed copy of the Order destined for the Government of Nicaragua will be transmitted to you shortly.

52. THE DEPUTY-REGISTRAR TO THE AGENT OF COSTA RICA

21 August 1987.

I have the honour to acknowledge the receipt on 18 August 1987 of the letter of that date by which Your Excellency was good enough to inform me that your Government has no objection to copies of the pleadings in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* being made available to the Government of Honduras.

For your information, I may mention that a copy of your letter has been delivered to the Agent of Nicaragua.

(Signed) Bernard NOBLE.

53. THE DEPUTY-REGISTRAR TO THE AGENT OF NICARAGUA

21 August 1987.

I have the honour to refer to my letter of 14 August 1987 transmitting a copy of a request by the Government of Honduras that the pleadings in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* be made available to it pursuant to Article 53, paragraph 1, of the Rules of Court, and to my letter of 18 August 1987 transmitting a copy of a letter from the Agent of Costa Rica indicating that his Government has no objection to that request. The proceedings in that case have of course now been terminated, following the notice of discontinuance filed by Nicaragua on 12 August 1987, by the Order made by the President of the Court on 19 August 1987.

As Your Excellency will be aware, the practice of the Court is that a decision is normally taken at the time of the opening of the oral proceedings, under Article 53, paragraph 2, of the Rules, to make the pleadings and annexed documents accessible to the public. Until then, the pleadings remain confidential and neither the Registry nor the parties themselves make copies available to anyone not concerned in the case. When a decision has been taken under Article 53, paragraph 2, of the Rules, from that time on, and in particular after the proceedings have terminated, the pleadings in that case, and in general the documents destined to be reproduced in the series *Pleadings, Oral Arguments, Documents*, may be regarded as in the public domain even before the relevant volume in that series appears. A request by a third State for copies of the pleadings therefore does not in such circumstances require the application of the procedure of paragraph 1 of Article 53.

The present situation is unprecedented in the sense that, since the adoption of the current Rules of Court, it has not occurred that a case has been discontinued after one or more pleadings have been filed, but before any decision has been taken under Article 53, paragraph 2, of the Rules. The Court is aware, from the communications received from the Parties, that the dispute to which the case relates has not yet been resolved, but that efforts are being made toward its peaceful settlement in a wider context; hence a cautious approach is called for. The President of the Court proposes to lay the question of the status of the pleadings in this case, and that of the possible continuing applicability of Article 53, before the Court for decision.

If however it should be the case that neither of the Parties has any objection to the pleadings being made available to the Government of Honduras, the President would consider it appropriate to authorize this, without prejudice to the wider question of the status of the pleadings, which remains reserved for decision by the Court. I should therefore still be obliged if Your Excellency could indicate the views of the Government of Nicaragua on this particular point, not later than 31 August 1987.

54. THE DEPUTY-REGISTRAR TO THE AGENT OF COSTA RICA

21 August 1987.

I have the honour to transmit to Your Excellency herewith a copy of a letter which, on the instructions of the President of the Court, I have today sent to the Agent of Nicaragua in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*, and venture to draw your attention to the fact that the question of the status of the pleadings in this case, and that of the possible continuing application of Article 53 of the Rules of Court, will be laid before the Court for decision.

55. THE DEPUTY-REGISTRAR TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

(facsimile)

27 August 1987.

I communicate herewith for your information the text of an Order made on 19 August 1987 by the President of the International Court of Justice recording the discontinuance of the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* and removing it from the Court's List. The printed version will follow very shortly.

56. THE AGENT OF NICARAGUA TO THE REGISTRAR

31 August 1987.

I have the honour to refer to the letter of 21 August 1987 which communicates the request of the President of the Court that the Government of Nicaragua should indicate its views on the pleadings in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* being made available to the Government of Honduras pursuant to Article 53, paragraph 1, of the Rules of Court.

The Government of Nicaragua, while taking notice that the Government of Costa Rica has indicated that it has no objections to this request, wishes to point out that it does not consider that the Government of Honduras — or any other nation for that matter — could have any special right to have made available the pleadings in a case that has been discontinued.

On the other hand, the Government of Nicaragua considers that the pleadings before the Court in this instance are documents of public interest and as such should be available to other nations.

Therefore, in the understanding that all parties to the Statute will have available the pleadings in this case, Nicaragua has no objection that they be made so available to the Government of Honduras.

57. THE DEPUTY-REGISTRAR TO THE AGENT OF NICARAGUA

2 September 1987.

I have the honour to acknowledge receipt of Your Excellency's letter of 31 August 1987 concerning the request of the Government of Honduras that the pleadings and annexed documents in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* be made available to it. I have the honour further to inform you that the President of the Court has decided, after consideration of the views expressed in that letter and those expressed on behalf of Costa Rica in a letter from its Agent dated 18 August 1987 (a copy of which was transmitted to you with the Registrar's letter of that date), to accede to the request of the Government of Honduras.

The views of the Government of Nicaragua as to the pleadings being made available to other States parties to the Statute have been duly noted, and will be taken into account in the event of a request to that effect being received from any such State.

Copies of the pleadings are accordingly being made available to the Government of Honduras, which is also being informed that, as indicated in the Registrar's letter of 21 August 1987, the question of the status of the pleadings remains reserved for decision by the Court, and that accordingly the copies are to be treated at present as confidential. The Government of Costa Rica is also being informed of the President's decision.

58. THE DEPUTY-REGISTRAR TO THE AGENT OF COSTA RICA

2 September 1987.

I have the honour to transmit to Your Excellency herewith a copy of a letter dated 31 August 1987 from the Agent of Nicaragua concerning the request of the Government of Honduras that the pleadings and annexed documents in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa*

Rica) be made available to it. I have the honour further to inform you that the President of the Court has decided, after consideration of the views expressed in that letter and those expressed on behalf of Costa Rica in your letter dated 18 August 1987, to accede to the request of the Government of Honduras.

The Agent of Nicaragua has been informed of this decision, and informed also that the views of his Government as to the pleadings being made available to other States parties to the Statute have been duly noted, and will be taken into account in the event of a request to that effect being received from any such State.

Copies of the pleadings are accordingly being made available to the Government of Honduras, which is also being informed that, as indicated in the Registrar's letter of 21 August 1987, the question of the status of the pleadings remains reserved for decision by the Court, and that accordingly the copies are to be treated at present as confidential.

59. THE DEPUTY-REGISTRAR TO THE AMBASSADOR OF HONDURAS TO THE NETHERLANDS

2 September 1987.

I have the honour to inform Your Excellency that the President of the Court, having ascertained the views of the Governments of Nicaragua and Costa Rica, has decided to accede to the request, made in your letter of 13 August 1987, that the pleadings in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* be made available to the Government of Honduras.

Copies of the pleadings and annexed documents concerned are accordingly being dispatched to you under separate cover.

I am however specifically to emphasize that, as no decision had been taken by the Court, prior to the discontinuance of the proceedings, to make the pleadings accessible to the public under Article 53, paragraph 2, of the Rules of Court, and the Court has not yet been advised of any resolution of the dispute underlying the case now discontinued, the President has decided that the question of the status of those pleadings and documents shall for the time being remain reserved for the decision of the Court. They should therefore be treated at present as confidential.

60. THE AMBASSADOR OF HONDURAS TO THE NETHERLANDS TO THE DEPUTY-REGISTRAR

9 September 1987.

I acknowledge receipt of your letter of September 2, 1987, as well of the documents annexed to it, which refer to the pleadings in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*.

I appreciate the decision of the President to accede to our request and I take due note that as no decision has been taken by the Court to make the pleadings accessible to the public under Article 53, paragraph 2, of the Rules of the Court, the pleadings and documents should be treated as confidential.

61. LE GREFFIER ADJOINT AU MINISTRE DES AFFAIRES ÉTRANGÈRES D'AFGHANISTAN[1]

9 septembre 1987.

Le Greffe de la Cour internationale de Justice, se référant à sa lettre du 21 août 1986 transmettant un exemplaire de la requête introductive d'instance en l'affaire relative aux *Actions armées frontalières et transfrontalières (Nicaragua c. Costa Rica)*, a l'honneur de transmettre ci-inclus une copie de l'ordonnance par laquelle, le 19 août 1987, le Président a prescrit de rayer ladite affaire du rôle de la Cour.

Des exemplaires imprimés seront expédiés par la voie normale dès leur parution.

62. THE DEPUTY-REGISTRAR TO THE AGENT OF COSTA RICA[2]

10 September 1987.

I have the honour to send herewith, for your information, a copy of a letter dated 9 September 1987 which I have today received from the Ambassador of Honduras to the Netherlands subsequent to the despatch to his Government of a copy of the pleadings in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*.

63. THE DEPUTY-REGISTRAR TO THE AMBASSADOR OF HONDURAS TO THE NETHERLANDS

11 September 1987.

I have the honour to acknowledge receipt of Your Excellency's letter of 9 September, following the despatch to your Government of a copy of the pleadings in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*, and take note of your remarks regarding the status of these pleadings.

A copy of your letter has been communicated for information to each of the Agents in the case concerned.

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[1] Une communication analogue a été adressée aux autres Etats Membres des Nations Unies et aux Etats non membres des Nations Unies admis à ester devant la Cour.

[2] A communication in the same terms was sent to the Agent of Nicaragua.

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